DATUM POSTS OF JURISPRUDENCE

HUGHES

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OF

JURISPRUDENCE

BY

WILLIAM T. HUGHES
AUTHOR OF "CONTRACTS" AND OF "PROCEDURE"

Melius petere fontes quam sectari rivulos.

Regula pro lege, si deficit lex.

"The Roman still holds dominion over this world by the silent empire of his law."

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PREFACE

A Datum Post is a point from which a reckoning is made. Every great structure is drawn from a Datum Post. Surveyors and engineers in building railroads, bridges, dams and canals, make their estimates from Datum Posts and Datum Lines. Every exact science has these fundamental positions, upon which the learned in the profession agree, and upon which their hypotheses are based. Has the law such Datum Posts, and if it has, what are they? Put this question to a number of lawyers and see how diverse the answers will be. Few indeed will name a dozen of the great maxims or of the leading cases, around which the law has grown. Inquire what maxim was affirmed in the "Squib Case," and what in Dovaston: 217. Ask which maxim governs in the construction of our written constitution, whether there is an unwritten constitution expressed in the maxims and what those maxims are. Law students are generally not trained to answer these questions, and they are consequently not familiar with the "Datum Posts" of the law. It is the object of this book to place these Datum Posts, in the shape of maxims and cases illustrating them, before the reader. The maxims on pp. 11-14 are offered as Datum Posts, and the discussions in Cases 1-100 are to disclose a *datum line* which is called the mandatory record. The practitioner without technical knowledge of that record is incapable of clearly presenting and conducting a cause.

To illustrate: It is observed that geographers have so written that all may learn the great divisions of the earth and its great circles, and prominences which are the geographer's Datum Posts. It is easy to learn that mounts Everest, Blanc, and Chimborazo are the most notable elevations. Now why can not the great basic principles of jurisprudence be gathered and so set that all can find and learn them? Ulpian, Bacon and Hamilton said they could be. Were these matchless intellects mistaken, is a question this work submits.

From mountains, rivers start and are fed as they flow downward. Maxims and their applications are the mountains and rivers of the law. *Regula pro lege, si deficit lex* (where the law is deficient the maxim rules) is a Datum Post in dealing with the history and the philosophy of the law.

The Rhine from its glacial swaddlings on the highest Alps courses on down receiving its 12,000 tributaries, until all are lost in the marshy grave the river has made for itself from Denmark to Belgium, and in the mud banks of Holland or the sands of the Zuyder Zee. The Rhine has its head in the sky and its feet in its briny marsh. As it is with the Rhine, so it is with fundamental principles of the law in the American states; they are found in the maxims, the highest source of the law, but are unfortunately lost to view in the morass of conflicting decisions. Consequently appears the wisdom of the maxim *Melius est petere fontes quam sectari rivulos* (it is better to seek the fountains than to wander down the rivulets).

To promote the interests of students everywhere, the following pages are submitted to affirm the proposition that the law has its landmarks, or beacon lights. Whoever is interested in the last proposition may well consider what is presented in relation to maxims, and the prescriptive constitution; relating to these, what is said has been in view of the fact that the American states and courts are most provincial, if not tribal, and in some tribes heterogeneous. Even the optimist must admit that the condition in New York, Indiana, Illinois, Missouri, and Colorado is incompatible with the stability and usefulness of the law; in these states no human sagacity can know the law and make juridical statements so as to meet the uniform acceptance and approval of state power. He who will deny this can not be familiar with the incompatible decisions in these states. (See *Windsor:* 1 and following cases.)

Relating to the mandatory record the decisions of several states are like an alternating electric fan. Macbeth's despairing apostrophe to the equivocal performances of the tantalizing witches might appropriately be quoted by those who perceive conspicuous antinomies; the clear acceptance on the one hand,

and the rejection on the other, of principles vital to government may well be likened to the fan.

And if he who has studied federal procedure insists that the subject is beyond human capacity, and is as uncertain as are the views of the courts of the chaotic states, it must be confessed that he can point to many irrefragable muniments of evidence to prove his proposition. Such a condition casts upon our jurisprudence a shadow, not dubious merely, but ominous. In relation to such cases as *Windsor:* 1, *J'Anson:* 91, and *Dovaston:* 217, *Murray:* 219, will be found observations upon the conceived causes of the threatening clouds which hang over our boasted American civilization. Indeed, if it be true that history repeats itself, may it not be that these causes are leading us on to a deluge?

The corruption and the failure of jurisprudence is a first and near step to a national cataclysm. We beg to quote:

> "There is the moral of all human tales;
> 'Tis but the same rehearsal of the past,
> First Freedom, and then Glory—when that fails,
> Wealth, vice, corruption—barbarism at last.
> And History, with all her volumes vast,
> Hath but one page."

The condition in several states offers pointed and abundant illustrations. However, here, mention of two will suffice; these will suggest to the student that he may be between Scylla and Charybdis. For if venerable and erudite judges cannot determine whether or not courts of sister states understand and apply fundamental principles, then how can the student? The late case: *Atlantic R. R.* v. *Benedict Co.*, — Fla. —, 42 So. 529, 532, 533, shows that a truly learned judge correctly understood and applied *Verba fortius accipiuntur contra proferentem* (every presumption is to be made against a pleader), this Mount Everest of jurisprudence. But from a thousand volumes from New York the court was unable to satisfactorily determine whether or not that DATUM POST was respected therein. Now who can clearly show that it is? Where is that fortunate student? And from Missouri is one of the late cases which reaffirmed the maxim from antiquity, in a truly notable decision holding that the statutory record can not be used for the mandatory record, the DATUM LINE already referred to. Every stu-

dent should read *Pennowfeski,* — Mo. —, 103 S. W. 542-543, and pause to inquire how it is that floods of literature and great schools have tolerated the dreadful if not alarming conditions reflected from the Florida and the Missouri cases, and in all of those jurisdictions where the "theory of the case" immolates the mandatory essentials of a constitutionalism. Let him look from the statement we make on page eleven and therefrom judge whether the philosophy of the law is at present properly written and impressed. If graduates have been given a view from molehills instead of Alpine mountains, then they may have reason to conclude that they have asked for bread and have not only been given a stone, but sufficient stones for awaiting monuments.

To enable students to perceive the causes of the bewilderment apparent from the official reports of supreme courts is a full justification for asking a book-ridden profession to fairly consider one more, and that the smallest possible.

These pages are also offered to demonstrate that the law can be written upon a condensed-intensive plan, integrating both the old and the current law, and at the same time evolving a key to the library. Finding the law being its larger part, the means of accomplishing that desideratum are not overlooked but are constantly kept in view.

These pages present considerable matter found in the author's works on Contract and on Procedure. Indeed it may be said that they are a revision of matter and of plan therein. As an auxiliary thereto these pages will be found light, portable and convenient, and will, at the same time, be found practically complete in themselves. In the many-shelved library, laden with unwieldy digests, the ever-lengthening lines of cyclopedias, the ceaseless inpour of annotated cases and the numberless gatherings of matter offered to beginners, this little work is designed to fill a distinctive niche. It is offered as a highly-condensed companion piece, as a guide and a complement to all well prepared works that relate to or discuss the old and world-wide law. The effort has been to make it as small and compact as is possible consistently with giving necessary views, and submitting leading questions. And it seems due to inform the reader that there is being prepared for

the press a work of the most comprehensive and fundamental character to be entitled "The Grounds and Rudiments of Law," which will embrace a text-index upon the plan of the author's other works referred to, and in which some of the matter in this volume will be included. This part of the larger works is offered as an introduction to the whole series, it being the belief of the author that the law is an entirety and that it can be articulated upon the plan to be unfolded.

The demonstration is burdened with an effort to introduce and impress matters of great and leading importance, or in other words, the DATUM POSTS.

Beginning with *Windsor:* 1, several important matters are considered. As to the full significance of that case, and all that it teaches, both it and the following cases should be well considered. They reveal the springs of government. From them will appear the relations of Procedure to government, and that Procedure lies at the base of government, of contract, of tort and of crime. Here is a needed lesson as to the supposed distinctions between adjective and substantive law. (See Preface Hughes' Procedure.) With that case is introduced the mandatory record (see *Pennowfeski, supra*) its functions and purposes, and from the viewpoint opened up, this record is discussed as a focus from which issue and radiate numberless rules, relating to all subjects of the law. To support the foregoing conclusions, attention is called to the facts presented in the first twenty-four cases. After these, to *Dickson:* 34, are cases presenting important rules relating to *res adjudicata* and its cognate subjects; here and early, the estoppels are introduced, and their position, as parents of many rules of "substantive" law, explained. From *Dickson:* 34, to *Bailey:* 44, the allegation, the admission, the denial and the issue have complete attention. Next is *Iverslie:* 46, and other cases impressing the rules relating to oral and the best evidence. Following these is a gathering of cases presenting the prominent rules of procedure, equity, construction, evidence, tort, crime and contract; as to the latter, see cases 300-417. Within the gathering, are presented more than 500 leading cases, under which are cited numerous cognate cases, all of which are not only burdened with the six leading subjects mentioned, but the

entire body of the law as well; from these cases the law can be articulated. At a glance, the reader can see how the principal maxims are presented and illustrated in their application. More than one hundred maxims are so illustrated. The work is impregnated with the view that there is an unwritten or prescriptive constitution, which consists of the fundamental maxims of government, which limit or expand the words in written constitutions. The canons of construction are a part of every branch, and its prolific outgrowths, of every collocation of words in all compacts and documents; these canons are DATUM POSTS.

Trist: 214, and the cases following will indicate the influence of the prescriptive constitution. Inseparably connected therewith are the fourteen conserving principles, enumerated and defined at pp. 7-14 Hughes' Procedure. Constant reference will be made to these, as *Datum Posts* from which issue and radiate numberless rules, and hundreds of these are traceable as interactions throughout all subjects of the law (64 Cent. Law Jour. 129-134, 169-174). These conserving principles are so important that they should be introduced in a generalized way at the start, therefore they are epitomized here as follows: Requirements of appellate procedure will be illustrated in cases like *Campbell:* 2; collateral attack, by *Windsor* and *Campbell,* and following cases; *res adjudicata* is introduced in cases 25-30; Due Process of Law, *Murray:* 219-232; requirements for the division of state power, 142-146; for the removal of causes, *Freeman:* 287; *Furman:* 147*a*; requirements for the comity of courts: requirements for justification defenses, *J'Anson:* 91; for the election of remedies, *Smith:* 156; for public policy, *Cromwell:* 26; *Munday:* 79; constructive notice, *Windsor:* 1; for fixed rules of construction, *Dovaston:* 217; the policy of waiver: 290-299; the requirement for the best evidence: 46-58.

The work is developed upon the theory that these principles are the backbone of the law, and that every philosophic treatment of evidence, pleading and practice must be written from and around these leading subjects as *Datum Posts.*

The support of the conserving principles will be shown to be the mandatory record already referred to, which will be completely defined and elucidated as a constitutional implication (*Windsor:* 1; *J'Anson:* 91, Hughes' Proc. §§ 7-12). Other

important questions, as the reader will readily discover, are introduced and discussed.

Finally, it is observed, that it is the matter of the Roman and of his successor, the Norman, that is sought to be gathered and presented upon a new alignment. The Roman and the Norman are the races that conceived and developed cosmopolitan law. The matter they left is easily shown to be the immutable constitution. The principles of the prescriptive constitution pervade all subjects. These principles are neither ancient, medieval nor modern: they are eternal and they are necessities for every government of limited and defined powers. Such governments were framed by constructive statesmen who knew and respected fundamental principles and reckoned from these principles as DATUM POSTS. Only intellects that understand the beacon lights of jurisprudence can upbuild a commonwealth. Here is in mind the lines of Sir William Jones, "What Constitutes a State." (See *Lange:* 159.)

Antiquity did nothing in vain. And its greatest gift to posterity is the Datum Posts of Jurisprudence. From these the simplicity, the morality, the intensive usefulness, the history and the philosophy of the law must be demonstrated.

The maxims are old and well worn but then they have worn best. There is no branch of the law that is not traceable from the maxim acorns, roots or heartwood. It was from these rudiments that Paul spoke before Festus and Agrippa. And who has been more powerful or more eloquent?

The Roman understood and reasoned from these DATUM POSTS and who have built better? His laws did more for the undying glory of Rome than did her armies and navies.

> "Peace hath her victories, not less renowned than war,"
> Where the outlook knows and follows a fixed star
> That leads, a kindly light, from chaos shoals, afar.

Statesmen and jurists have always defended and vindicated the fundamental maxims as the greatest asset of government, and in defense of them have continually repeated the injunction, "Remove not the ancient landmarks which thy fathers have set."

W. T. HUGHES.

FOREWORD: HOW TO USE THIS BOOK

The organization and plan of this work is novel, and necessarily so, for the condensed-intensive performance. It is singularly a DATUM POST monitor and enumerator. Why it is so, will appear from the citation matter following the title of each case. Finding the law being its larger part, the first demonstration is the finding. To find *Windsor:* 1, the search is ended from a glance at that case; likewise *Lampleigh:* 301, and following cases. *The first step is to find the law. If it can be found generally it can be learned.* From index topic heads, the case or maxim is found; with these impressed, generally the task of mastering a rule is more than half done. To illustrate: Take the case last cited, *Lampleigh:* 301, and refer to it. See the various works on Contract as is pointed out under that case on p. 157, and note what a key to the library is revealed. Thus will appear the value of a well prepared table of cases, wherein the old and the notable case is cited. To impress fully the foregoing, look also at *Cutter:* 308, and the following cases, *Frost, Hochster, Wood, Hallett, Robinson, Taylor, Cumber, Rann.* In connection with these cases will be cited thirty authors on Contract who have cited and written from and around those DATUM POSTS; and this work gathers and cites those cases as beacon lights, or landmark cases, which they truly and singularly are; for they are the most notable and world-wide in reference to the rules they annunciate. Generally these are the epitomized statements of the case, *e. g.*, on p. 157, after the words *"Lampleigh stated,"* is found an illustration of the rule stated, as will be found in that case.

The beginner will do well to read the statements of the cases for a first reading of the work, and afterward read the observations that follow those statements. He can readily learn what the citation means from any lawyer who uses tables of cases. Most of the maxims cited will be found on pages 11-14. Particular attention is due what is observed of them in the Preface and throughout the work. By observing the foregoing directions the novice will find a ready and sure introduction to the cases and maxims relating to Contract, and at the same time perceive the facility of finding them. (Thus is afforded a key to the library. See Preface.) The cases are numbered as if sections; the index refers to these sections unless pages are expressly mentioned.

Students impressed with the notion that it is best to learn local and provincial cases nevertheless will be greatly advanced by an introduction to that matter to which cosmopolitan law is moored. In many cases the lawyer appears in the federal courts, also is sought or is sent beyond the precincts where provincial law is written or discussed for local use. The cases of every court can be easily tested by those cases that are in almost universal use and which are familiar to all broadly educated jurisprudents. For these a condensed and ready-reference gathering of fundamental principles expressed in the *maxim and case nomenclature of all high courts in all countries will prove a valuable epitome.*

The maxim arrangement and treatment are believed to be unique. Every maxim cited is translated either in the index where all are made index topic heads or elsewhere as may be referred to; and it should be observed that wherever these are followed by a single star, maxims so designated will also be found at pages 11-14 of the work and there translated. Forty-two maxims in the index are followed by two stars; these are so marked to indicate that these are the subjects of chapter discussions in the author's Procedure. To illustrate: AUDI ALTERAM PARTEM will be found in its alphabetical place in the index; followed by two stars it will likewise be found in the table of maxims on page 11 and there translated; it is also found in the Procedure, Chapter I., §§ 51-77. Following this maxim in the table on page 11 are references to *Windsor:* 1; following this maxim in the index are found the following: Pp. 2, 4, 7, 10, 11; §§ 1, 58, 59, 65, 66-72, 79, 93, 122, 127, 183, 219, 222, 225, 264-268, 278, 279.

The cases being numbered as sections and standing as such, they are for convenience indexed as sections. By turning to these cases or sections last above mentioned, there will be found the elucidation of *Audi*, etc., afforded herein. If more is sought then the Procedure may be consulted; it is offered as a surpassingly complete maxim work.

The maxim content of this work is a leading and a large feature, which will only be fully perceived from following through the work some of the principal maxims, as above illustrated.

It was not deemed best to attempt to tabulate all the cases cited. However, the leading cases will be found in their alphabetical places followed by their respective numbers. This will enable the reader to turn to them with ease and facility, *e. g.*, if *Lampleigh v. Brathwait* is desired, it will be found under the title L., standing thus, *Lampleigh:* 301; it will also be found in the table of Leading Cases, pp. 1-11.

NOTE: The performance has necessitated the most condensed plan of citation. As far as practical, the abbreviations in Bouvier's Dictionary and the Lawyer's Reference Manual have been employed. For necessary brevity and condensity: C. stands for Commonwealth; P. for People; *q.v.* for *quod vide* (which see); R. for Regina (Queen) or Rex (King); R. R. for Railroad Company; S. P. for same point; U. S. for United States. Generally the first name of the title of a case is given; if this is classed and numbered with the leading cases, it can readily be found, thus: Windsor: 1 which is read Windsor v. McVeigh, Leading Cas., No. 1. Other cases are so referred to in the preface. By turning to these the reader will perceive the economies of the plan adopted.

TABLE OF CONTENTS

THE LEADING CASES.....Pp. 1-11

THE PRINCIPAL MAXIMS.....Pp. 11-14

The Leading Cases discussing Fundamental principles; The relations of procedure to government; Illustrating that the study of procedure is a study of government, and that the leading rules of evidence, pleading and practice emanate from and are imbedded in the prescriptive constitution the principles of which constitute the grounds and rudiments of law; The mandatory record, its functions and what it supports; The conserving principles of procedure; Their interactions with government, its principles and scheme of protection and the commonplace rules of evidence, pleading, practice and jurisdiction. Leading Cases..1-112

Superior and inferior tribunals; Distinctions; Presumptions of regularity; Construction of proceedings; Certainty; Taxation requirements. Leading Cases 113-134

Allegata et probata must correspond; Important principles of the prescriptive constitution, reflected from procedure. Leading Cases....135-138

Amendments, the prayer to pleadings. Leading Cases.....139-141

Division of State power; Implied power of government; Constitutional implications; Important principles of procedure. Leading Cases....142-158

Judicial immunity; Privilege of counsel; Of ministerial offices; Trespassers *ab initio;* Arrests. Leading Cases.....159-169

Jurisdiction of crime; *Dies non;* The judicial officer. Leading Cases.....170-177

Leading rules of evidence; *Nemo tenetur seipsum accusare;* Continuity; *Omnia præsumuntur contra spoliatorem;* Judicial notice; Presumption of regularity; Rules founded on the grounds and rudiments of law; Convenience, necessity, reason, the public welfare, alternations; Presumptions from possession; Best evidence; Burden of proof; Reasonable doubt; Evidence must be certain; Recent possession of the fruits of crime; *Corpus delicti* must be proved; Circumstantial evidence; Sanity, presumptions relating to; Intent, how proved; Every one is presumed to intend the natural direct and probable consequences of his act; Right to cross examine; Admissions and confessions of agents and accomplices; Impeachment of witnesses; Proof of handwriting; Negligence, how proved; *Res ipsa loquitur;* Evidence must be certain; System to prove intent; Collateral facts to prove issue; Hearsay, exceptions to rule; Shop books; General reputation, notoriety. Leading Cases..178-213*h*

Construction from the grounds and rudiments of law; The prescriptive constitution limits or expands the meaning of all compacts—Treaties—Constitutions—statutes—and contracts; Fundamental law is interpreted for the usefulness and perpetuity of government—public policy; *Salus populi suprema lex;* influence of the common law; *Verba fortius accipiuntur contra proferentem;* Dovaston (217); *Verba intentione debent inservire;* Harper (218); "Due Process of Law"; Murray (219) *Præsentia corporis,* etc.; Hurtado (220); "Cruel and unusual punishment"; Wilkinson (221); Constitutions yield to prescriptive organic law; Oakley (222); Indianapolis (223); O'Connell v. Reed (224); The requirements of the conserving principles of procedure limit or expand the words in constitutions and statutes; Bates (225); Inherent powers of courts; Implications; S. v. Townley (225*a*); Important rules of pleading; Limits of legislative power to interfere

with the means of the Judiciary, Huntsman (231); The study of procedure is the study of government, U. S. v. Cruikshank (232, reprinted in full with notes); Pleadings, limitations of liberal construction; Dobson (232*a*); James (233); Constitutions and statutes may be void in part; *Ex post facto* and retroactive laws; Impairment of the obligation of contracts; *Rex non potest peccare;* The state is not bound unless it is named to be bound; Barron (214); The word "Jury" how construed; Computation of time; Dicta of courts; Polity of the federal government; Title to statutes; Legislatures can not declare the effect of evidence; Sovereignty as parties to suits. Leading Cases.....212-260

Judicial shams, frauds and mockeries; Relief from fraud in judicial proceedings; *Coram non judice—Ex dolo malo non oritur actio;* Judgments may be set aside for fraud. Leading Cases.....261-270

Province of court and jury; Jurisdiction of each. Leading Cases.....271-272

Jurisdiction of courts; *Ubi jus ibi remedium;* Equity jurisdiction; Injunctions; Comity of courts; Terms of court; After notice warrantors and inheritors bound by judgments; Exemplary damages; Record in one case to prove damage in another. Leading Cases.....273-290

Statutory Record, its functions; Constitution of Appellate Procedure. Leading Cases.....290*a*

Appellate procedure; Fundamental rules of; General objections insufficient; Objections—exceptions not necessary as to void and incompetent matter; New trials; Assignment of error; Waiver; Estoppel; Matters of discretion; Waiver of dilatory or abatement matter favored as a conserving principle of procedure; Certainty required in appellate procedure; Certificate of doubt; Procedure; Delay of judicial proceedings. Leading Cases 290*a*-300

Contract; The request, the offer, acceptance; The assent, consideration, the formation of a contract; Statute of frauds; Signature to contract; Agents; Mistake; Bailment; Common carriers; Innkeepers; Illegality—*In pari delicto;* Restraint of trade; Public policy; Deceit; Fraud; Deception; Misrepresentation; Warranty—*Caveat emptor; Bona fide* purchasers; Assignments; Commercial paper; Notice from possession; Sales—Elements; Requirements; Agents, how sign; Fraud of agents; Contracts of the insane, of drunkards; Miscellaneous cases. Leading Cases 301-417

Index .....Pp. 218-250

DATUM POSTS

TABLE OF THE LEADING AND ILLUSTRATIVE CASES

Nos. 1-416

(Abbreviations used herein are explained in a prefatory note.)

No.

Abel v. Alexander (*Rees: King v. Baldwin*) (Relief of sureties) 334
Acraman v. Morrice (When title to property passes on sale) 406
Adams v. Lindsell (Contracts by letter; doctrine of continuity. *Nullus commodum capere*, etc.) 326
Addison v. Gandasequi (Agency; parties to suits upon contracts of agents, Thomson) 343
Allen v. S. (Impeachment of witnesses) 203
Allen v. Wright (Arrests; the law of) 167
Armory v. Delamire (Every presumption against a wrongdoer. *Omnia præsumuntur contra spoliatorem*) 180
Ashby v. White (There is no wrong without a remedy. *Ubi jus*, etc.) .. 273
Auburn & O. Canal Co. v. Leitch (The general demurrer searches the substantial pleadings and attaches to the first fault; it is never waived. McAllister. It will keep. Mallinckrodt) 9
Bailey v. Bailey (Proceedings in one case may be pleaded to estop a party in another case. *Allegans contraria.*) 44
Bainbridge v. Firmstone (Any, the least, favor will constitute a consideration for the wronged person to complain) 332
Baldey v. Parker (What is acceptance and delivery; statute of frauds contract for several articles, in all exceeding $50.00 in value sufficient) .. 337
Barnard v. Cushing (All within the four corners, will be looked after and construed, and effect will be given to all) 108
Barr v. Post (Perjury as a ground for setting aside a judgment. Graver) 265
Barron v. Baltimore (The first ten amendments of the federal constitution do not apply to the states. *Roy N'Est*, etc.) 241
Barrow v. Hill (Discretionary matters in practice; how viewed; are not except for abuse. Clyde Mattox) 298
Bartholomew v. Jackson (Considerations not moved by previous request of a party benefited thereby are insufficient to constitute a wrong) 302
Bartlett v. Crozier (Statutory claims and defenses must be pleaded with essential certainty. Rushton v. Aspinall) 6
Bassett v. Nosworthy (*Bona fide* purchasers in possession are protected in equity. LeNeve v. LeNeve) 395
Bates v. Bulkley (Statutes regulating practice are construed to maintain the conserving principles of procedure and not to defeat them. *Concordare leges*, etc.; Indianapolis, etc., R. R.) 225
Bauerman v. Radenius (Oral evidence admissible to show real party to record, and who directed the suit) .. 48
Baxter v. Portsmouth (Contracts of the insane) 414
Beardsley v. Dolge (Consent will not confer jurisdiction of subject-matter) 13
Beaumont v. Reeve (Past cohabitation no consideration for a promise. Promise to pay therefor, constitutes no wrong) 367
Belknap v. Schild (The government as a party. Sovereignty cannot be sued without its consent; Hunsaker v. Borden) 260
Beverley's Case (One cannot stultify himself, was the view of Coke; the old rule) 416
Billard v. S. (Reasonable doubt; the rule of distinguishes criminal evidence from civil) 189
Birkmyr (or *Byrkmyr*) *v. Darnell*, (Frauds and perjuries) 339
Bissell v. Spring Valley Township (Demurrers; admissions by; effect) 42
Blackett v. Royal Exchange Assurance Co. (Oral evidence inadmissible to prove a custom varying a contract) . 400
Blair v. Reading (Power of judges at chambers; the forms of the law are a part of the law) 170
Blair v. Ridgley (Construction of statutes; legislative power; limitations) 254

Leading Cases—Table. No.

Bloom v. Burdick (Limitations of judicial power; jurisdiction; elements. *Audi alteram partem.* A statutory power like the authority of an agent must appear and be strictly pursued, and that authority must affirmatively appear so it can be pleaded in subsequent causes for the requirements of the conserving principles. Ransom: 122; Thatcher: 117. Crepps)..... 266

Bobel v. P. (Title to express the subject of a statute—constitutional requirements) 250

Boileau v. Rutlin (Pleadings as evidence; their admissibility and effect. Bailey; Dickson cases)..... 43

Bonaparte v. Camden & Amboy R. R. (Injunctions to restrain a trespass). 278

Bonesteel v. Orvis (Judgment on dilatory matter is not *res adjudicata*).. 151

Bonnell v. Wilder (Burden of proof. *Actore non probante reus absolvitur*) 185

Borden v. Fitch (Fraud vitiates claims for an adjudication. *Audi*, etc.; Bloom) 267

Borkenhagen v. Paschen (*Probata* will not supply *allegata;* defenses not pleaded are waived. Evidence is inadmissible without allegations. Schutte, Bristow. Code rule)..... 81

Boston Ice Co. v. Potter (Mistake as to party contracting excuses from liability. One parting with his property by mistake is not wronged)... 320

Boston and Maine R. R. v. Bartlett (Continuity; presumption of applies in contract law. Adams v. Lindsell) 531

Bowlus v. Phoenix Ins. Co. (Pleadings must not be too narrow)..... 100

Boyd v. Blankman (Aider by pleading over—from subsequent pleadings. Hitchcock v. Haight)..... 62

Bradbury v. Cronise (Admissions upon a record are conclusive and invulnerable to evidence *aliunde.* Dickson; Bissell) 35

Brewer Brewing Co. v. Boddie (Motion for a new trial essential to present waivable error to an appellate court. General assignments of error insufficient. Miller v. Dill)..... 296

Brice v. Bannister (Assignees; rights to recover upon an assignment. *Assignatus utitur*, etc.)..... 398

Bristow v. Wright (*Allegata et probata* must correspond. There must be allegations. These limit jurisdiction. Campbell v. Greer: 2*a*; Fish v. Cleland: 12*c*. *Frustra probatur*)... 135

Brittain v. Kinnaird (Records are conclusive evidence. Mondel v. Steel). 50

Bronson v. Kinzie (Impairing the obligation of contracts. Von Hoffman v. Quincy; Calder v. Bull)..... 238

Brooks v. Martin (Illegal contracts enforced if illegality is too remote).. 370

Brown, Ex parte (Deception of courts a contempt. Sham and false pleading reprehensible. Graver; Barr v. Post) 105

Brown v. Butchers' & Drovers' Bank (Signature; what is a sufficient).. 346

Brown v. Lamphear (Mistake in sale; rescission; remedies) 347

Brown v. Spofford (Oral evidence to affect written) 54

Brown v. Swineford (Arguments of counsel if abusive and irrelevant are a ground for reversal)..... 161

Brugger v. State Investment Co. (Joinder of cause of action—of counts).. 162

Bulkley v. Landon (A promise to pay one for what he has already done without request is no consideration. *Ex nudo pacto*, etc.)..... 315

Bunn v. Riker (Illegal contracts—gambling. *Ex turpi causa*)..... 362

Burks v. Bosso (Statutory construction; important rule).....217*a*

Butler v. P. (Ordering a witness attached without first subpoenaing him is a contempt)..... 106

Byrne v. Boadle (*Res ipsa loquitur*, Kearney v. London R. R.; Stokes v. Saltonstall) 209

Calder v. Bull (*Ex post facto laws.* Bronson v. Kinzie)..... 237

California v. San Pablo R. R. (Dead issues are not a subject-matter to employ a court)..... 270

Calye's Case (Innkeepers; rights and remedies) 356

Campbell v. Greer (S. P. Campbell v. Porter) 2*a*

Campbell v. Porter (Consent will not confer jurisdiction of subject-matter; a *coram judice* record essential for many purposes. One may object to his own pleading, and for the first time in the appellate court. Van Leuven v. Lyke)..... 2

Carotti v. S. (Continuity; Doctrines of. Adams v. Lindsell)..... 179

Chandelor v. Lopus (Deceit; action of. Pasley v. Freeman)..... 374

Citizens' Street R. R. v. Stockdell (Evidence must be certain; essential facts must appear, and not be left for inference) 186

Clark v. Sires (Substance not imported by presumption of regularity. Hannah: 128) 2*c*

Clem v. Meserole (S. P. Windsor).... 2*b*

Cleves v. Willoughby (*Caveat emptor* applies to a lessee of lands)..... 383

Clyde Mattox Case (Arbitrary acts of judges will be reviewed. Barrow v. Hill) 153

Clydesdale Bank v. Paton (The statement of a cause of action must appear. Rushton v. Aspinall)..... 8

Coffin v. U. S. (Innocence is presumed). 185

Coggs v. Bernard (Bailments; Law of Trust and confidence for a gratuitous undertaking is a sufficient consideration) 350

Leading Cases—Table. No.

Cohens v. Virginia (Courts are bound by their records. *Dicta* does not bind. Horan v. Wahrenberger; Houston v. Williams) 244

Collector v. Day (Polity of the federal government. M'Culloch v. Maryland; U. S. v. Cruikshank) 148

C. v. Bean (Pleading statutes. Language of the statute generally sufficient. See U. S. v. Cruikshank) .. 226

C. v. Eastman (Indictments must be certain for "due process of law"; Huntsman v. S.; U. S. v. Cruikshank; R. v. Wheatley) 22

C. v. Gannett (*Res inter alios acta*, etc.; general reputation to convict) .213*g*

C. v. Hart (Construction; provisos) ... 227

C. v. Hess (The common law is construed into all subjects-matter. Trist: 212; Oakley: 222; Rushton: 5) 215

C. v. Kane (Prolixity of proof is to be avoided) 183

C. v. McKie (Burden of proof in criminal cases) 187

C. v. Macloon (Jurisdiction in criminal cases) 172

C. v. Roby (Conviction for a lesser offense when a bar to a prosecution for a greater; why there must be pleadings) 74

C. v. Rogers (Malice; how proved. *Res ipsa loquitur*) 199

C. v. York (Malice; how proved; it is inferred from facts and circumstances) 197

Conductors' Benefit Association v. Leonard (Appellate procedure; important rules; extension of time to file bill of exceptions; parties charged with knowledge of the record) 294

Cook v. Bradley (A consideration must be more than a volunteer gratuity to support a promise constituting a wronged person. Lampleigh v. Brathwait; Mills v. Wyman) 314

Cooke v. Oxley (Both sides must be bound, or neither, is a fundamental rule of contract law) 321

Cooper v. Kane (Oral evidence admissible to show usage of trade. Wigglesworth v. Dallison) 403

Cornfoot v. Fowke (The fraud of the agent is the fraud of the principal. Fitzsimmons v. Joslin) 385

Counselman v. Hitchcock (*Nemo tenetur seipsum accusare*) 178

Craswell v. Belanger (Diverse citizenship must be distinctly alleged to give federal courts jurisdiction, where that is required. It cannot be waived) 10

Crepps v. Durden (Inferior and statutory tribunals; jurisdictional facts must affirmatively appear. Bloom: 266; Clark v. Sires; Cruikshank: 232; *Omnia præsumuntur rite*, etc.; Limitations. Ricketson v. Richardson; Hannah v. Chase; Ransom v. Williams) 113

Cromwell v. County of Sac (Estoppel by verdict depends upon technical and abstruse rules; these stated in Outram v. Morewood. Defenses not pleaded are waived) 26

Cumber v. Wane (A promisee parting with no consideration for a promise is never wronged by it. *Ex nudo pacto non oritur actio.* See ACCORD AND SATISFACTION) 311

Cutter v. Powell (*Expressio unius est exclusio alterius:* Courts will not make contracts for parties) 308

Da Costa v. Jones (Gambling contracts; Holman: 363) 361

Dame v. Wood (Entire contract) 308*c*

Dant v. S. (What is sufficient evidence to convict; reasonable doubt. Billard v. S.; Citizens' R. R. v. Stockdell) 212

Dash v. Van Kleeck (Calder) 237*a*

Davenport v. Farrar (Matter not juridically presented cannot be judicially considered) 2*e*

Dennett, Petitioner (Division of state power is a great constitutional principle pervading procedure. Flournoy v. Jeffersonville. A study of procedure is a study of government. U. S. v. Cruikshank; R. v. Wheatly) 145

Deputron v. Young (Proceedings divesting one of his property must appear of record. Bloom v. Burdick; Ransom v. Williams; Thatcher v. Powell; Iversiie v. Spaulding) 121

Dickson v. Cole (Admissions by pleadings. Every presumption is against a pleader. A court will believe what the parties believe, if consistent with reason and the record) 34

Didsbury v. Thomas (Hearsay evidence inadmissible. *Res inter alios acta*) .213*e*

Diggle v. Higgs (Illegal contracts; *In pari delicto* defenses; how available. Holman v. Johnson; Trist v. Child) .. 371

Dimes v. Proprietors of Grand Junction Canal (*Nemo debet esse judex*, etc.; Oakley v. Aspinwall) 176

Dinehart v. Lafayette (*Ex parte* injunctions; pleadings as evidence; the allegation must be positive and certain) 279

Ditchburn v. Goldsmith (Gambling contracts; gambling; practice. Holman v. Johnson) 359

Dobson v. Campbell (Presumption of regularity to aid pleadings; limitations. *De non apparentibus.* U. S. v. Cruikshank) 232*a*

Dovaston v. Payne (*Verba chartarum fortius*, etc. Every presumption against a pleader. U. S. v. Cruikshank; R. v. Wheatly; Dickson v. Cole; Huntsman v. S.; Rushton v. Aspinall) 217

Drayton v. Wells (Testimony of wit-

Leading Cases—Table. No.

nesses dead, absent or subsequently disqualified. *Res inter alios acta*). 213
Dunlap v. Cody (Execution of process by means of fraud or deception vitiates. *Executio juris*, etc.; Illsley v. Nichols) 108
Dusenbury v. Ellis (Agency; parties in *ultra vires* contracts of agents).... 412
Dutton v. Gerrish (*Caveat emptor;* applies to a lessee. Cleves v. Willoughby) 381
Eastwood v. Kenyon (Frauds and perjuries—debt, default, or miscarriage of another. Birkmyr v. Darnell)... 336
Eddy Co. v. Blackburn (*Allegata et probata* must correspond. Bristow v. Wright) 136
Edwards v. Allouez Mining Co. (Equity will not aid a speculator as it would his assignor) 282
Edwards v. Kearzey (There is no wrong without a remedy. Validity of exemption laws) 286
Eliason v. Henshaw (See Adams v. Lindsell—Contracts by letter; telegram) 330
Ellis v. Esson (Parties—joint trespassers—release of one is a release of all) 389
Elmore v. Stone (Frauds and perjuries. What is a sufficient change of possession) 409
Evans v. Jones (Gambling contracts; Holman v. Johnson) 360
Farnam v. Brooks (Fraud, how alleged. Facts, not conclusions, must be pleaded. U. S. v. Cruikshank; Hanford v. Davies; Green v. Palmer).. 97
Felthouse v. Bindley (See Adams v. Lindsell) 325
Ferguson v. Crawford (Recitals in records may be contradicted. *Audi alteram partem.* Starbuck v. Murray) 264
Field v. Holland (Application—appropriation—of payments) 387
Field v. Mayor of New York (Defenses not pleaded are waived. Cromwell v. County of Sac; Munday v. Vail). 84
Fish v. Cleland (Pleadings are to confer also limit jurisdiction)..... 12*c*
Fitzsimmons v. Joslin (The fraud of the agent is the fraud of the principal. Cornfoote v. Fowke)..... 384
Fletcher v. Trewalla (Consent will not confer jurisdiction of subject-matter. One may dispute the validity of his own assessment) 18
Flournoy v. Jeffersonville (Division of state power. Dennett, petitioner. A clerk can not act as judge)..... 146
Freeman v. Howe (Property *custodia legis;* jurisdiction; comity of courts; important rules) 287
Frost v. Knight (Renunciation of contract gives immediate right to sue)..308*a*
Furman v. Furman (Vacating and setting judgments aside)..... 262
Furman v. Nichols (Federal question; how it must be made to appear)....147*a*

Leading Cases—Table. No.

Galpin v. Page, 3 Saw. 93 ("According to the course of the common law"—definition—"due process of law"; service by publication; origin and history) 63
Galpin v. Page, 18 Wall. (Superior and inferior courts; distinctions. Crepps v. Durden; Williamson v. Berry)... 64
Garland v. Davis (Courts *sua sponte* notice the record and act upon substantial defects in them without regard to the position of the parties. Campbell v. Porter)..... 60
Garland v. Gaines (Denials)..... 40
Garland v. Wholebau (*Consensus tollit errorem.* One cannot change his base on appeal, Limitations)..... 297
Gay v. Winter (Duty of courts to define issues before a trial)..... 138
Gentry v. U. S. (There must be allegations, and proof must correspond).. 88
Gibbs v. Benjamin (Sales; when title passes) 405
Gibler v. Mattoon (Only a wronged party can assign error in an appellate court) 96
Good v. Elliott (Gambling contracts; Holman v. Johnson; *In pari*, etc.).. 358
Goss v. Nugent (Oral evidence inadmissible to prove anything within the statute of frauds)..... 55
Grand Trunk R. R. Co. v. Ives (*Consensus tollit errorem;* Objections and exceptions must not be too broad)...290*c*
Graver v. Faurot (Judgments founded on false and sham pleadings will be set aside) 103
Green v. Palmer (Facts, not conclusions of law, must be pleaded. Code pleadings; genius of; S. P. Borkenhagen: 81; Mallinckrodt: 12*a*, Code) 90
Guedell v. P., S. P. C. v. Roby (Bristow: 135) 74*a*
Gulick v. Ward (Illegal contracts; puffers at auctions. Remedies. *In pari*, etc.) 364
Hall v. Corcoran (Illegal contracts; *In pari*, etc.) 369
Hallett v. Wylie (Destruction of property; whose loss) 308*d*
Hamilton v. Whitridge (Injunctions to restrain crime) 280
Hammack v. White (*Res ipsa loquitur;* presumptions from happening of accident. Kearney v. London R. R.).. 208
Hand v. Waddell (Skeleton bills of exceptions—practice) 395
Hanford v. Davies (Facts, not conclusions of law, must be pleaded. U. S. v. Cruikshank; Green v. Palmer; Farnam v. Brooks)..... 86
Hanly v. Gandy (Handwriting; how proved; rules) 204
Hannah v. Chase (Jurisdictional facts are never presumed; they must affirmatively appear. Bloom v. Burdick; U. S. v. Cruikshank; Ransom v. Williams) 128

Leading Cases—Table.

	No.
Harkness v. Hyde (Service of process in a wrong jurisdiction is not waived by pleading over; exceptional rule).	152
Harper v. City Insurance Co. (Construction: *Verba intention debent inservire.* Letter must yield to the intent; practical construction)	218
Harris v. Brooks (Deceit; fraud of principal will discharge surety)	386
Harris v. Muskingum Manufacturing Co. (Corporate existence; when presumed)	229
Harris v. S. (The mandatory and the statutory records—functions of. Motions in arrest relate to the former).	158
Harris v. Tyson (Vendees buy realty *caveat emptor.* Constructive notice)	380
Harvey v. Richards (A court is bound by its record; *Res adjudicata* requirements exclude usurpation)	32
Harvey v. Tyler (*Omnia præsumuntur rite,* etc., liberally applied. Crepps v. Durden; Ransom v. Williams)	123
Haskel v. Haskel (Statements of demands must be separate and distinct)	101
Hastings v. Lusk (Immunity of counsel; limitations)	160
Hauswirth v. Sullivan (Returns of sheriffs not conclusive; may be impeached. Service of process on Sunday. S. v. Conwell; *Dies dominicus.*	51
Hendrick v. Lindsay (One for whom a consideration moved is a wronged party. Exceptional rule. One may contract for a third, who may sue in his own name)	319
Hickory v. U. S. (Circumstantial evidence most weighty, sufficient to establish the most important facts)	194
Higham v. Ridgway (Hearsay evidence; declarations of deceased persons against interest)	213c
Hitchcock v. Haight (Aider; a verdict will not aid defective pleadings. Boyd v. Blankman. Motions in arrest)	12
Hochster v. De La Tour (Renunciation of contract gives immediate right to sue)	308b
Hogins v. Plymton (A consideration necessary to constitute a wronged person)	379
Hollister v. Nowlen (One cannot stipulate against his own fraud. *In pari delicto,* etc.)	354
Holman v. Johnson (*In pari delicto* contracts courts will refuse to enforce for reasons of public policy. Illegal defenses need not be pleaded, if they otherwise appear)	363
Hood v. Sudderth (Prayer; when sufficient)	141
Hopkins v. Tanqueray (Warranty; *Caveat emptor.* Hogins v. Plymton)	378
Hopper v. Covington (An authority must be pleaded. Facts, not conclusions of law, must be pleaded. Material allegations cannot be omitted)	4

Leading Cases—Table.

	No.
Horan v. Wahrenberger (Authority of supreme courts to make a judgment may be inquired into. Houston v. Williams)	85
Hoskins v. P. (A plea of not guilty essential to authorize a trial, and it must appear from the record. Crain, Munday)	80
Household Fire Insurance Co. v. Grant (See Adams v. Lindsell)	328
Houston v. Williams (A court's authority to proceed and adjudicate must appear from its records. *Dicta* does not bind. Cohens v. Virginia; Horan v. Wahrenberger)	245
Howard v. S. (Conclusions of law are void in process)	166
Humphreys v. McCall (Denials upon information and belief. Strict requirements)	38
Hunsaker v. Borden (Sovereignty cannot be sued against its consent. Belknap v. Schild)	259
Huntsman v. S. ("Due process of law" demands certainty in charging a crime. U. S. v. Cruikshank; R. v. Wheatley; Moore v. C.)	231
Hurtado v. California (Due process of law; requirements are satisfied if fundamental principles of the common law are respected. Murray v. Hoboken Land Co.; C. v. Hess)	220
Illsley v. Nichols (What cannot be done legally cannot be done illegally or what cannot be done directly cannot be done indirectly, Dunlap: 108)	169
Indianapolis & St. Louis R. R. v. Horst (Construction; limitation of legislative power to interfere with procedure. O'Connell v. Reed)	223
Ingalls v. Bills (Common carriers; diligence required)	353
Insurance Co. v. Folsom (Bills of exceptions essential to show error in regard to waivable matter)	157
Israel v. Reynolds (A replication essential for an issue to authorize a court to try a cause. Munday v. Vail)	83
Iverslie v. Spaulding (The best evidence of which a case in its nature is susceptible shall be produced. What ought to be of record must be proved by record and by the right record)	46
James v. Bowman (Construction, indictments must be certain. U. S. v. Cruikshank. Statute void in part, void *in toto*)	233
J'Anson v. Stuart (Facts, not conclusions of law, must be pleaded. Hopper v. Covington; U. S. v. Cruikshank. Defamation defenses must be pleaded; defenses not pleaded are waived. Important notes)	91
Jones v. Just (Warranty; *Caveat emptor*)	376
Jordan v. Greenboro Furnace Co. (Frauds and perjuries; how pleaded; conflicting rules)	228

Leading Cases—Table. No.

Jordan v. Norton (Acceptance of contracts must be of precise terms offered) 324
Kansas City, M. & B. R. R. v. Riley (Common carriers; liability of; cases) 357
Kearney v. London R. R. (*Res ipsa loquitur;* presumption from happening of accident. Byrne v. Boadle).. 211
Kelley v. Hemmingway (Certainty essential for a contract)..... 304
Kelly v. Bemis (Unconstitutional law is no law) 285
Kemble v. Farren (Parties may stipulate a measure of damages unto themselves) 391
Kempe's Lessee v. Kennedy (Inferior and statutory tribunals; jurisdictional facts must appear of record. Iverslie v. Spaulding) 115
Kewaunee County v. Decker (Code pleadings; cannot be "flesh, fish, or fowl") 29
King v. Baldwin (Sureties; remedies of. Abel v. Alexander; Rees v. Berrington) 334*b*
King v. Oregon Short Line R. R. (Negligence; pleading of, what sufficient; general allegations, when permitted) 205
Kingston's (Duchess of) *Case* (Estoppel of record—*res adjudicata*—rules) 76
Kraner v. Halsey (Dilatory—abatement pleadings—must be certain; ambiguity will defeat. U. S. v. Cruikshank) 299
Kyle v. Kavanaugh (Mistake avoids a contract; remedies) 348
Lampleigh v. Brathwait (A consideration must move upon the request of the promisor in order to constitute the promisee a wronged person. *Ex nudo pacto non oritur actio*)..... 301
Lanfear v. Mestier (Judicial notice. Matter of law need not be pleaded, *De non apparentibus,* etc.)..... 181
Langabier v. Fairbury, etc. R. R. (An injunction may issue upon Sunday).174*a*
Lange v. Benedict (Immunity of judicial officers) 159
Lawrence v. Fast (Certainty essential in taxation proceedings)..... 132
Lea v. Lea (Ambiguity will defeat a plea of *Res adjudicata*)..... 36
Lee v. Griffin (Frauds and perjuries; contract for article to be manufactured need not be in writing)..... 338
Lee v. Muggeridge (A moral obligation will not support a promise)..... 318
Le Neve v. Le Neve (*Bona fide* purchasers of property; doctrines of).. 396
Lester v. Foxcroft (Equitable exceptions to the statute of frauds. Effect of circumstantial evidence)..... 341
Lickbarrow v. Mason (Where one of two equally innocent persons must suffer from the fraud of a third, he who first trusted must first suffer).. 394

Leading Cases—Table. No.

Livingston v. Roosevelt (Partners; rights and liabilities)..... 345
Loeffner v. S. (Motive—malice—intent; how proved) 196
Logan v. U. S. (*Expressio eorum.* M'Culloch) 249
Losee v. Buchanan (*Res ipsa loquitur.* Presumption from happening of accident) 210
Lough v. Outerbridge (*Consensus tollit errorem.* Montgomery v. Edwards). 293
Lovejoy v. Murray (Warrantors bound by proceedings after notice)..... 289
Lowry v. Moore (False and sham pleadings give no right to be heard).... 104
Maclay v. Harvey (See Adams v. Lindsell) 327
Mahaska (County of) *v. Ingalls* (Hearsay; declarations and entries of deceased persons against interest)....213*d*
Maher v. S. (Practical construction; its weight and effect) 255
Mallan v. May (Illegal contracts—in restraint of trade, when valid; contract may be void in part)..... 373
Mallinckrodt v. Nemnich (S. P. Campbell v. Porter, Record essentials. *Verba fortius;* Dobson)..... 12*a*
Marbury v. Madison (Vesting of judicial power by constitution is exclusive. *Expressio unius,* etc.)..... 142
Martin v. Hunter's Lessee (Appellate power of federal supreme court; polity of federal government. A great and instructive case)..... 246
Marx v. Hanthorn (Taxation proceedings must be certain; 132-133)..... 126
Matthews v. S. (The *corpus delicti* must be proven. Hickory v. U. S.)..... 193
McAllister v. Kuhn (The ground of the general demurrer is never waived; it attaches to the first fault)..... 3
McArthur v. Howett (A plaintiff must look after and conserve the files. See CONSTRUCTIVE NOTICE; Iverslie v. Spaulding) 99
McCaughey v. Schuette (Matters of evidence need not be pleaded)..... 184
McCulloch v. Maryland (Construction; *Expressio eorum,* etc.)..... 147
McCully v. Clark (Negligence is not presumed; it must be alleged and proved) 206
McElmoyle v. Cohen (Full faith and credit due the judicial records of sister states. Mills v. Duryee).... 56
McKyring v. Bull (New matter must be pleaded. Defenses not pleaded are waived) 33
McLaughlin v. Kelly (Remedies must be afforded according to the record requirements) 31
McNaghten's Case (Insanity as a defense; burden of proof)..... 195
Miller v. Dill (Objection that evidence is "irrelevant, immaterial and incompetent," is too general).....290*b*
Mills v. Duryee (Full faith and credit

Leading Cases—Table. No.

due judicial records of sister states. McElmoyle) 57
Mills v. Wyman (A consideration must move at the request of the promisor to constitute the promisee a wronged person. Lampleigh v. Brathwait)... 316
Mitchell v. Kingman (Contracts of insane persons; insanity as a defense). 415
Mitchel v. Reynolds (Contracts in restraint of trade; *In pari delicto* defenses) 372
Mobley v. Nave (Records are conclusive; Mondel) 46*a*
Mohr v. Manierre (Sales of decedent's lands by probate courts; "due process of law"; jurisdiction)..... 68
Molton v. Camroux (Insanity as a defense to a contract)..... 413
Mondel v. Steel (Records as evidence are irrefragable in *res adjudicata* questions) 77
Montana C. M. v. Missoula County (Pleadings essential) 10*b*
Montgomery Beer Bottling Works v. Gaston (Records, what are)..... 47
Montgomery v. Edwards (*Consensus tollit errorem*) 292
Moore v. C. (Indictments must set forth a crime with certainty. Every presumption is against a pleader. U. S. v. Cruikshank; Dovaston v. Payne) 21
Morley v. Attenborough (Warranty; *Caveat emptor*) 377
Moser v. White (There can not be an oral assessment and collection of a tax. Iverslie v. Spaulding)..... 125
Mostyn v. Fabrigas (Local and transitory actions; jurisdiction)..... 274
Munday v. Vail (Defenses not pleaded are waived) 79
Murray v. Hoboken Land Co. ("Due process of law" defined)..... 219
Myers v. Erwin (Pleas in abatement; Technical rules) 150
Neagle's Case (See Logan v. U. S.; M'Culloch v. Maryland)..... 248
Needham v. Thayer (Judgments may be set aside for fraud; records may be impeached) 261
Nelson v. Rockwell (Inferior and statutory tribunals; Records of must affirmatively show jurisdictional facts). 129
New York Central R. R. v. Fraloff (Common carriers; liability for baggage) 355
Nixon v. Ruple ("What ought to be of record must be proved by record." Iverslie v. Spaulding)..... 127
Noble v. Durrell (Construction; A custom contrary to a statute is bad).... 251
Oakley v. Aspinwall, 3 N. Y. (Construction; fundamental principles annex themselves. C. v. Hess; *Nemo debet esse judex,* etc. Dimes v. Grand Junction Canal, Indianapolis, etc., R. R. v. Horst; *Concordare leges legibus.* 222
Oakley v. Aspinwall, 4 N. Y. (*Audi alteram partem.* Notice is implied).. 66

Leading Cases—Table. No.

O'Connell v. Reed (Indianapolis, etc., R. R. v. Horst; construction; Limitations of legislative power)..... 224
Olive v. S. (Judicial notice. Lanfear v. Mestier; *De non apparentibus,* etc.) 182
Oscanyan v. Winchester Arms Co. (Admissions; solemn, judicial, binds client. Dickson v. Cole; Pearce v. Brookes) 41
Outram v. Morewood (Estoppel by verdict—by record; leading rules. Cromwell v. County of Sac)..... 25
Pain, Ex parte (Repugnant pleadings are void. Every presumption against a pleader. Dovaston v. Payne)..... 107
Pasley v. Freeman (Deceit—misrepresentation; remedies for. *Caveat emptor.* Chandelor v. Lopus)..... 375
Payne v. Cave (Auction sales; when sale is complete; when title passes. Tarling v. Baxter; Gibbs v. Benjamin) 307
Peachy v. Somerset (Parties may stipulate for fixed, liquidated damages. Kemble v. Farren)..... 392
Pearce v. Brookes (Illegal contracts; *In pari delicto* defenses. Holman v. Johnson; Oscanyan v. Winchester Arms Co.) 368
Penn v. Baltimore (Equity acts *in personam.* Jurisdiction) 275
Pennoyer v. Neff (*Audi alteram partem.* "Due process of law." Service by publication) 58
P. ex rel. Attorney General v. Brown (Jurisdictional facts must affirmatively appear. Conclusions of law are nullities) 131
P. v. Hastings (A constitutional enumeration for the exercise of power is exclusive. *Expressio unius,* etc.; P. v. Maynard)..... 144
P. v. Maynard (Judicial power vested by a constitution is exclusive, P. v. Hastings; Marbury v. Madison)..... 143
P. v. McCumber (False and sham pleas may be stricken, on motion)..... 110
P. v. Rogers (Intent; motive; malice; how proved. C. v. Rogers)..... 198
P. v. Seymour (Curative statutes; limitations of) 256
People's Bank v. Calhoun (Consent can not confer jurisdiction) 12*d*
Perez v. Fernandez (Splitting causes of action; mandatory record how viewed; technical construction relating to) 2*e*
P. v. Turner (Construction of constitutions must accord with natural right) 252
Perry v. Porter (S. P. Bristow)..... 136*a*
Peter v. Compton (Frauds and perjuries; contracts not to be performed in a year)..... 340
Phelps v. Racey (Possession of fruits of crime—of game out of season; conclusive evidence of guilt; limita-

Leading Cases—Table. No.

tions of legislative authority. S. v. Thomas) 191

Piper v. Pearson (Inferior statutory tribunals; *Coram non judice* proceedings. Crepps v. Durden)..... 114

Planing Mill Co. v. Chicago (S. P. Iverslie; Mandatory and statutory records) 2*d*

Polhill v. Walter (Agent warrants his authority. Parties liable on agent's contracts) 411

Poor v. Carleton (Denials must be true, full, positive and conscientious. Dickson v. Cole)..... 37

Price v. Torrington (Books of account; when admissible in evidence).....213*f*

Provident Life and Trust Co. v. Mercer County (Municipal bonds; authority of, must appear of record)..... 89

Pusey v. Pusey (Specific delivery of chattels; when decreed in equity)... 276

Pym v. Campbell (Oral evidence inadmissible to alter or vary a writing. Exceptions) 52

R. R. v. Greer (Equity suffers not a wrong without a remedy. Bills *quia timet*) 283

R. R. v. Stewart (Bills of exceptions; prolixity should be avoided).....290*a*

Railway Company v. Lockwood (One cannot contract for his gross negligence, fraud or wanton acts)..... 352

Rann v. Hughes (All simple contracts depend upon a consideration alleged and proved) 312

Ransom v. Williams (Functions of the "due process of law" record in constructive notice and to resist collateral attack) 122

Raymond v. Johnson (Denials upon information and belief of what one is presumed to know raises no issue. Humphreys v. McCall)..... 39

Rees v. Berrington (Sureties; remedies of, Abel v. Alexander).....334*a*

R. v. Ellis (System; several transactions to show character of one. Strong v. S.; *Res inter alios acta*).....213*b*

R. v. Gibson (Province of court and jury. S. v. Croteau)..... 149

R. v. Gibson (Pleas in abatement—technical and important rules)..... 272

R. v. Goldsmith (Indictments must be certain. Moore v. C.; U. S. v. Cruikshank) 20

R. v. Keyn (Crimes; jurisdiction)... 171

R. v. Lewis (Crimes; jurisdiction).... 173

R. v. O'Brien (Former jeopardy; conviction for a less offense will bar a greater, when; exceptions. C. v. Roby) 75

R. v. Oxford (Sanity presumed until contrary is shown. Continuity; McNaghten's Case; Marler v. S.)..... 200

R. v. Partridge (Possessions of fruits of crime *prima facie* proof of guilt) 190

R. v. Riley (Answers to collateral questions are conclusive; important rule).213*h*

Leading Cases—Table. No.

R. v. Rowlands (Indictments must be certain. U. S. v. Cruikshank; C. v. Eastman; S. v. Thurstin)..... 234

R. v. Vandercomb (Former jeopardy; upon what it depends)..... 73

R. v. Vaux (Former jeopardy; essentials) 72

R. v. Waters (Indictments; certainty required. When the word "said" incorporates a previous description)... 71

R. v. Waverton (See R. v. Waters; U. S. v. Cruikshank 70

R. v. Wheatley (Indictment; essentials; U. S. v. Cruikshank. Private and public wrongs; distinctions)..... 19

Reynolds v. Stockton (S. P. Munday). 79*a*

Rice v. Shute (Joinder—non-joinder—mis-joinder—of parties) 95

Richardson v. St. Joseph Iron Co. (Corporate existence must be averred. Harris v. Min. Co.)..... 230

Ricketson v. Richardson (Service by publication. A statutory power contrary to the course of the common law must be strictly pursued)..... 59

Rison v. Farr (Construction; statutes, if constitutional, are valid. A plea bad in part is bad *in toto*)..... 253

Robinson v. Davison (*Actus dei*, etc., a defense to a contract)..... 309

Robinson Mining Co. v. Johnson (A statement of a cause of action must be technically certain) 16

Robinson v. Raley (Pleadings may be made instruments of chicane)..... 45

Roden v. Helm (S. P. Campbell v. Porter) 12*b*

Rosen v. U. S. (Scandalous and obscene matter cannot be permitted, although material: conflict) 92

Roy v. Horseley (Terms of court. Technicalities of the law are the safeguards of the law)..... 288

Runkle v. U. S. (Records of inferior and statutory tribunals must affirmatively show each jurisdictional fact)..... 120

Rushton v. Aspinall (A wrong must be described in a pleading and in all cases alike. Omitted allegations not supplied by aider)..... 5

Russell v. Mann (Statutory rights must be strictly pleaded) 87

Russell v. Place (A pleading must describe a subject-matter to serve the purposes of *res adjudicata*)..... 27

Rustin v. Merchants' etc. Co. (Best evidence required. Iverslie v. Spaulding) 134

Ryall v. Rowles (Assignments; validity of; parties in actions to)..... 397

Sanborn v. Sanborn (A court must acquire jurisdiction from the right pleadings. *Quod ab initio*, etc.).... 61

Savacool v. Boughten (Regular process is the defense of executive officers). 164

Seabury v. Grosvenor (Equity; injunction will not aid one not standing fair) 281

Seattle National Bank v. Jones (De-

Leading Cases—Table. No.

nials; inconsistent defenses. Dickson v. Cole) 36
Sherman v. Kitsmiller (Certainty essential for a contract) 305
Shindler v. Houston (Sales; delivery of possession; what is) 407
Shuey v. U. S. (Offerer may retract offer of contract at any time before performance) 323
Shutte v. Thompson (Incompetent evidence may be objected to generally. Miller v. Dill) 291
Six Carpenter's Case (Trespassers *ab initio;* who are, in procedure) 165
Skeate v. Beale (Answers must be sufficient. J'Anson v. Stuart. Green v. Palmer) 82
Sloman v. Walter (See Kemble v. Farren; Peachy v. Somerset) 393
Smith v. Hodson (Election of remedies; important rules) 156
Smith v. Marrable (Lessee of furnished apartments; *Caveat emptor* does not apply to) 382
Smith v. Wilson (Oral evidence to prove custom—usage) 401
Soutier v. Kellerman (See Smith v. Wilson) 402
Spraigue v. Thompson (A statute may be void in part and valid in part. See James v. Bowman) 236
Spring Co. v. Knowlton (Illegal contracts; *In part* defenses) 366
Springer v. Shavender (Consent will not confer jurisdiction of subject-matter pleadings essential; jurisdiction of person and subject-matter essential) 24
Starbuck v. Murray (A record must be founded upon *bona fide* proceedings, not criminal proceedings, to be *coram judice.* Ferguson) 263
S. v. Baughman ("Due process of law"; what is. Division of state power. Fictitious causes do not bind. Graver v. Faurot; Wonderly v. Lafayette County) 268
S. v. Beach (Statutes may prescribe what is *prima facie* evidence of guilt. Due process of law. S. v. Thomas) 258
S. v. Bolden (Fundamental principles are interpreted into statutes. Bates v. Bulkley; C. v. Hess; Oakley v. Aspinwall; Indianapolis, etc. R. R. v. Horst) 216
S. v. Conkling (Courts will not pass on dead issues. California v. San Pablo R. R.) 109
S. v. Conwell (*Dies dominicus,* etc.; construction of statute) 174
S. v. Croteau (Province of court and jury in criminal cases) 271
S. v. Marler (Burden of proof in homicide cases where insanity is the defense) 188
S. v. Thomas (Statutes cannot declare what is conclusive evidence. S. v. Beach) 257

Leading Cases—Table. No.

S. v. Thurstin (Indictments; essentials. U. S. v. Cruikshank) 23
S. v. Townley (Inherent powers of courts) 225*a*
Stetson v. Kempton (Liability of officers for *ultra vires* acts. Lange v. Benedict; Savacool v. Boughten) 163
Stilk v. Myrick (One already bound to do a thing is not wronged by a further promise to induce that performance) 313
Stokes v. Saltonstall (*Res ipsa loquitur.* Kearney v. London R. R.) 207
Stokes v. State (System) 213*a*
Stubbings v. Evanston (a placitum essential) 49
Sturdivant v. Hull (*Descriptio personæ* words. When words of addition are surplusage) 410
Sturges v. Burton (A cause of action should not be repeated in fictitious statements) 111
Taintor v. Prendergast (Agency; undisclosed principal; parties. Thomson v. Davenport) 344
Tarble's Case (Appellate power of the federal supreme court; the record essential for the exercise of its powers. Justification defenses. M'Culloch v. Maryland) 247
Tarling v. Baxter (When title passes by sale. Gibbs v. Benjamin) 404
Tayloe v. Merchants' Fire Insurance Co. (Contracts by letter. Adams v. Lindsell) 329
Taylor v. Caldwell (*Actus dei,* etc.; when a defense to contracts. Robinson v. Davison) 310
Taylor v. Porter (Due process of law; definition) 219*a*
Tempest v. Fitzgerald (Frauds and perjuries; sales; possession essential to pass title. Shindler v. Houston) 408
Terry v. Anderson (Vested rights; defense accruing under the statute of limitations cannot be impaired) 240
Thatcher v. Powell (Condemnation and sequestration; proceedings proceed upon facts shown from record—continuity—constructive notice. Ransom v. Williams) 117
Thomas v. Board (Allegations essential and must be certain) 10*a*
Thomas v. Mackey (*Allegata et probata* must correspond; courts must have authority to proceed and hear causes, take testimony and enter judgments. Shutte v. Thompson) 15
Thomson v. Davenport (Agency; Disclosed and undisclosed principals; contracts; parties. Who may sue and be sued) 342
Thornborow v. Whitacre (Consideration; adequacy of to constitute a wronged person. Bainbridge v. Firmstone) .. 333
Tilton v. R. R. (Taxation; assessments must be certain. Lawrence v. Fast; P. v. Hastings; Marx v. Hanthorn) .. 133
Tool Co. (*Providence*) *v. Norris* (Illegal

Leading Cases—Table. No.

contracts; *In pari* defenses. Holman v. Johnson) 365

Trevivan v. Lawrence (Estoppel of record—*res adjudicata;* the last estoppel binds) 78

Trist v. Child (Construction; morals interpreted into compacts. Oakley v. Aspinwall; P. v. Turner)..... 214

U. S. v. Cruikshank (Due process of law; indictments; certainty; presumption against pleader. R. v. Wheatley; Moore v. C.; Huntsman v. S.; Dovaston v. Payne. Indictments under statute must be expanded. *Cf.* C. v. Bean)..... 232

U. S. v. Gooding (Evidence; declaration of agents; *res gestæ;* indictments; sufficient to follow language of statute) 202

U. S. v. King (Recent possession of the fruits of crime, when sufficient to convict. R. v. Partridge)..... 192

U. S. v. Mills (Indictment; certainty essential. U. S. v. Cruikshank)..... 235

U. S. v. Perez (Indictments; certainty required for protection under former jeopardy. R. v. Vandercomb; R. v. Vaux) 69

Vadakin v. Soper (Omission of jurisdictional facts is not supplied by construction. Van Leuven v. Lyke).... 11

Vaiden v. C. (Bills of exceptions; prolixity to be avoided; facts may be certified. R. R. v. Stewart)..... 155

Van Cleaf v. Burns (*Res adjudicata* depends upon the "due process of law" record) 17

Van Leuven v. Lyke (Omitted allegations are not waived by appeal and may be assigned for error for the first time in the appellate court. Campbell v. Porter) 14

Van Slyke v. Trempealeau County Ins. Co. (Judicial power cannot be delegated. Judge cannot permit another to sit for him) 177

Virginia Coupon Cases (Constitutions are the supreme law).....285*a*

Vogt v. Schienebeck (Parties contract for themselves) 324*a*

Von Hoffman v. Quincy (Vested rights; impairment of. Bronson v. Kinzie; Terry v. Anderson) 239

Voorhees v. Bank of U. S. (Presumption of regularity. *Omnia præsumuntur rite,* etc. Ransom v. Williams; Williamson v. Berry)..... 119

Wabash R. R. v. Friedman (*Allegata et probata* must correspond. Bristow v. Wright) 137

Waco Water and Light Co. v. Waco (Certificate of doubt; practice relating to) 300

Wagner v. Gibbs (Evidence; record of criminal conviction; when admissible to show right to exemplary damages) 290

Wain v. Warlters (Frauds and perjuries. Memorandum, when sufficient. Consideration must be expressed)..... 335

Walden v. Bodley (Amendments; limitations of the right to amend)..... 139

Walker v. Turner (Jurisdictional facts must affirmatively appear upon record of inferior tribunal. Crepps v. Durden; Kempe's Lessee v. Kennedy; Galpin v. Page) 118

Warren v. Slade (Computation of time; Important rules) 243

Watkins v. S. ("Due process of law" requires *bona fide* parties; one cannot prosecute himself) 269

Weaver v. Toney (*Audi alteram partem;* Judges cannot choose their cases; usurpation vitiates) 67

Welborn v. Weaver (Delivery, acceptance of deeds; what is a sufficient. Acceptance of deeds) 388

Weltmer v. Bishop (A cause of action must be real, and defined).....268*a*

Wheadon v. Olds (Mistake in contract; relief from) 349

White v. Bluett (Consideration must be parted with to support a promise to constitute one a wronged party) *Ex nudo* 317

White v. Corlies (Contracts must be consummated before they are obligatory) 303

White v. Fort (Merger of remedies).... 175

White v. Lyons (Prayer; any is sufficient; a general one is good) 140

White v. Wagar (Search warrants; requirements of, strict. Construction; *Noscitur a sociis*) 130

Whitney v. Chicago & N. W. R. R. (Several statements of a claim for recovery under codes; when permitted) 112

Wiebold v. Herman ("Due process of law" requires parties *actor* and *reus;* the names of these must appear in full for essential certainty. Williams v. Eggleston) 98

Wigglesworth v. Dallison (Oral evidence admissible to prove usage, custom; when) 399

Wilkerson v. Utah (Cruel and unusual punishments; what are) 221

Williams v. Bankhead (Parties; who are essential, "Due process of law" requires) 93

Williams v. Carwardine (Contracts; rewards; obligations from)..... 332

Williams v. Eggleston (A wronged party is essential for a suit; and he must be described. Wiebold v. Herman). 94

Williams v. Hingham Turnpike Co. (Statutory rights must be pleaded with certainty. U. S. v. Cruikshank; Bartlett v. Crozier) 7

Williams v. Peyton (Record must evince jurisdictional facts to support constructive notice, and to resist collateral attack—be *coram judice*— Ransom v. Williams) 116

Leading Cases—Table. No.

Williamson v. Berry (The authority of a court to enter a judgment is never foreclosed; it is always open. Horan v. Wahrenberger) 65

Wilson v. Brett (Bailments; care and diligence required. Coggs v. Bernard) 351

Wilson v. U. S. (One seeking a review in an appellate court is entitled to a statement of all said and done in the trial court, in a bill of exceptions).. 154

Windsor v. McVeigh (*Audi alteram partem.* Arbitrariness and a denial of fundamental justice is a ground of reversal upon the mandatory record).. 1

Wonderly v. Lafayette County (Judgments on false and sham pleadings will be set aside. Graver v. Faurot; Barr v. Post; *Debile fundamentum*, etc.) 102

Woollam v. Hearn (Oral evidence; when admissible. Pym v. Campbell)..... 53

Work v. S. (The word "jury" in a constitution means twelve men) 242

Worrall v. Munn (Escrow deeds; requirements) 390

Wright v. Griffey (*Res adjudicata* must be pleaded; estoppels must be pleaded) 28

Wright v. Tatham (Evidence. The right to cross-examine a witness is a part of "due process of law," is a fundamental right. Murray 201

Zaleski v. Clark (Uncertain agreement is no contract; certainty essential). 306

TABLE OF THE FUNDAMENTAL MAXIMS

The following maxims are among the most important; they express leading principles, and often parts of the prescriptive constitution, which is the "metwand" of construction. (Hughes' Proc. 204.) Around the maxims, *Frustra probatur quod probatum non relevat, Verba fortius accipiuntur contra proferentem*, and *De non apparentibus et non existentibus eadem est ratio*, the judicial power of a government of limited and defined authority can be established and conducted. Codes and statutes that oppose these maxims must be construed away in a constitutionalism. Those maxims are important and reliable guides. They are illustrated in many cases; of these are *Bristow:* 135; *Dovaston:* 217; *Rushton:* 5. Discussions of these in the last generation are analogous to the discussions of Shelley's Case of which Kent makes very appropriate mention. See Dovaston.

Many digests under the title Maxims point to citations of them *e. g.*, Pattison's Missouri Digest, also the digest of the L. R. A. Reports.

Accessorium non ducit sed sequitur suum principale: The incident shall pass by a grant of the principal, but not the principal by a grant of the incident. M'Culloch: 247; Logan: 249.

Actore non probante reus absolvitur: If the plaintiff does not prove his case, the defendant is absolved. Bristow: 135; Bonnell: 185.

Actus curiæ neminem gravabit: An act of the Court shall prejudice no one. Cumber: 311; *Boni Judicis.*

Actus dei nemini facit injuriam: An act of God shall be so construed as to affect no one injuriously. Cutter: 308.

Actus non facit reum nisi mens sit rea: Act and intent must concur to constitute crime. Cruikshank: 232; McNaghten: 195.

Ad proximum antecedentem fiat relatio nisi impediatur sententia: A relative is to be referred to the next antecedent, unless the sense would be impaired. R. v. Waters: 71; R. v. Waverton: 70.

Ad quæstionem facti non respondent judices; ad quæstionem legis non respondent juratores: The judges do not answer to questions of fact; the jury do not answer to questions of law. S. v. Croteau: 271.

Allegans contraria non est audiendus: He is not to be heard who alleges things contradictory to each other. Dickson: 34; Pain: 107; Baily: 44.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur: Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact may, in the same manner, be removed. Pym: 52; Woollam: 53.

Assignatus utitur jure auctoris: An assignee is clothed with the rights of his principal or of the assignor. Lickbarrow: 394; Brice: 398.

Audi alteram partem: The law hears before it decides. Windsor: 1; Murray: 219; Springer: 24; Taylor: 219*a*; Pennoyer: 58; Williamson: 65.

Boni judicis est ampliare jurisdictionem:

Leading Cases—Principles.

It is the duty of a court when necessary to amplify the limits of its jurisdiction. Penn: 275. *Actus curiæ.*

Caveat emptor: Let a purchaser beware. Chandelor: 374-384; Windsor: 1. *Simplex commendatio.*

Certum est quod certum reddi potest: That is certain which can be made certain. R. v. Waverton: 70; R. v. Waters: 71; Sturdivant: 310.

Cessante ratione legis cessat ipsa lex: When the reason of the law ceases, so does the law itself. Indianapolis R. R.: 223; Bates: 225.

Communis error facit jus: A common error makes law (What was at first illegal, being repeated many times, is presumed to have acquired the force of usage; and then it would be wrong to depart from it). Kelly: 285; Maher: 255.

Concordare leges legibus est optimus interpretandi modus: To make laws agree with laws is the best mode of interpreting them. Bates: 225; Indianapolis R. R.: 223; Rushton: 5.

Consensus tollit errorem: The acquiescence of a party who might take advantage of an error obviates its effect. Montgomery: 292, 290*a*-299.

Contemporanea expositio est optima et fortissima in lege: A contemporaneous exposition is the best and most powerful in the law. Maher: 255; Harper: 218; Noble: 251; Cohens: 244.

Cujus est instituere ejus est abrogare. He who con institute can also abrogate. Cruikshank: 232; Lange: 159.

Debile fundamentum fallit opus: Where the foundation fails, all goes to the ground. Rushton: 5; R. v. Wheatley: 19; Windsor: 1; Cruikshank: 232.

De non apparentibus et non existentibus eadem est ratio: A court can not take notice of any fact not judicially made to appear. Cruikshank: 232; Rushton: 5; Wheatley: 19; Hannah: 128; Williamson: 65, 231-234.

Dies dominicus non est juridicus: Days of the Lord are not days for juridical work.

Equity attaching for one purpose attaches for all. Brugger: 161; Ferguson: 264.

Ex dolo malo non oritur actio: A right of action cannot arise out of fraud. Needham: 261; Wonderly: 102; Graver: 103; Dunlap: 108; Ferguson: 264.

Executio juris non habet injuriam: The law will not in its executive capacity work a wrong. Dunlap: 108.

Ex facto oritur jus: Out of the facts arises the law. Graver: 103.

Ex nudo pacto non oritur actio: No cause of action arises from a mere promise. Lampleigh: 301; Bainbridge: 332.

Ex post facto laws: Calder: 237.

Expressio eorum quæ tacite insunt nihil operatur: The expression of those things which are tacitly implied operates nothing.

Leading Cases—Principles.

M'Culloch: 147; S. v. Townley: 225*a*; Logan: 249.

Expressio unius est exclusio alterius: The express mention of one thing implies the exclusion of another. Marbury: 142; P. v. Maynard: 143; S. v. Conwell: 174; Bobel: 259; Abel: 334.

Ex uno disces omnes: From one thing you can discern all. Strong v. S.: 213*a*.

Falsa demonstratio non nocet: A false description does not vitiate. Bloom: 266.

Falsus in uno, falsus in omnibus: False in one thing, false in all. Pain: 107; Dickson: 34; Graver: 103.

Favorabiliores rei potius quam actores habentur: Defendants are rather to be favored than plaintiffs. See *Actore; Semper; In æquali melior; In pari; Verba fortius; De non apparentibus.*

Frustra probatur quod probatum non relevat: It is vain to prove what is not alleged. Windsor: 1; Campbell: 2; C. v. Roby: 74, 74*a*; Borkenhagen (Code): 81; Green: 90; J'Anson: 91. *De non apparentibus; Verba fortius.* These maxims are basic principles of the prescriptive constitution. Cases 1-100 are burdened with illustrations of their application.

Ignorantia legis neminem excusat: Ignorance of law is no excuse. Windsor: 1; Cruikshank: 232; Mallinckrodt: 12*a*.

In æquali jure melior est conditio possidentis: When the parties have equal rights, the condition of the possessor is better. Armory: 180; Lickbarrow: 394.

In jure non remota causa, sed proxima, spectatur: In law, the proximate and not the remote cause is to be looked to. Scott v. Shepherd; Gilson v. Delaware Canal.

In pari delicto potior est conditio defendentis (et possidentis): Where both parties are equally in fault, the condition of the defendant is preferable. Holman: 263; Oscanyan: 41.

In præsentia majoris cessat potentia minoris: In the presence of the major the power of the minor ceases. Oakley: 222; Trist: 214; Indianapolis R. R.: 223; Kelly: 285; Taylor: 219*a*.

Interest reipublicæ ut sit finis litium: It concerns the public that there be an end to litigation. Kingston's Case: 76.

Leges posteriores priores contrarias abrogant: When the provisions of a later statute are opposed to those of an earlier, the earlier is considered as repealed. Dash: 237*a*.

Lex non exacte definit sed arbitrio boni viri permittit: The law does not define exactly but trusts to the judgment of a wise and good man. Indianapolis R. R.: 223; Cases.

Malum non præsumitur: Evil is not presumed. *Nemo præsumitur.* Bonnell: 185. *Actore; Semper.*

Melius petere fontes quam sectari rivulos: It is better to seek the fountains than to wander down the rivulets. *Regula.*

Leading Cases—Principles.

Modus et conventio vincunt legem: The form of agreement and the convention of the parties overrule the law. Kemble: 391; Robinson: 309.

Multitudo imperitorum perdit curiam: A multitude of ignorant practitioners destroys a court. C. v. Roby: 74; J'Anson: 91.

Necessitas inducit privilegium quoad jura privata: Necessity privileges one acting under its influence. Langabier: 174*a*.

Nemo dat qui non habet: No one can give who does not possess. Lickbarrow: 294. *Assignatus; Caveat.*

Nemo debet bis vexari, si constat curiæ quod sit pro una et eadem causa: No one ought to be twice punished, if it appear to the court that it is for one and the same cause. Kingston's Case: No. 76; Outram: 25; Cromwell: 26.

Nemo debet esse judex in propria sua causa: No one should be judge in his own cause. Dimes: 176.

Nemo præsumitur malus: No one is presumed to be bad. See *Malum; Actore; Semper.*

Nemo tenetur seipsum accusare: No one is bound to accuse himself. Counselman: 178.

Nihil possumus contra veritatem: We can do nothing against truth. Graver: 103; Thou shalt not bear false witness.

Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo legamine quo ligatum est: Nothing is so consonant to natural equity as that each thing should be dissolved by the same means by which it was bound. Shuey v. U. S.: 319. A statute is necessary to repeal a statute. Authority under seal is necessary to make a deed is a leading rule of agency.

Non hæc in fœdera veni: I did not come into this compact. Boston: 320; Abel: Rees: 334.

Non potest adduci exceptio ejusdem rei cujus petitur dissolutio: A plea of the same matter, the dissolution of which is sought by the action, cannot be brought forward. Starbuck: 263; Mills: 57.

Noscitur a sociis: A thing is known by its companions. Burks: 217*a*; White: 130.

Nova constitutio futuris formam imponere debet non præteritis: A statute ought to be prospective not retrospective in its operation. Calder: 237.

Nullum tempus occurrit regi: Lapse of time will not bar the rights of the crown (state). *Roy n'est;* Barron: 241.

Nullus commodum capere potest de injuria sua propria: No one can take advantage of his own wrong. Dickson: 34; Graver: 103; Cutter: 308; Adams: 326. See *Allegans.* He who seeks equity.

Omne majus continet in se minus: The greater contains in itself the less. Kraner: 299.

Omnia præsumuntur contra spoliatorem: All things are presumed against a wrongdoer. Armory: 180.

Omnia præsumuntur rite et solemniter esse acta: All things are presumed to have been rightly and regularly done. Crepps: 113; Hannah: 128; Cruikshank: 232; Ferguson: 264; Harvey: 123.

Omnis ratihabitio retrotrahitur et mandato æquiparatur: A subsequent ratification has a retrospective effect and is equivalent to a prior command.

One is liable for the natural, direct and probable consequences of his act. Lickbarrow: 294; C. v. York: 197; *Qui primum,* etc.

Optimus interpres rerum usus: Usage (or custom) is the best interpreter of things. Wigglesworth: 399; 400. *Contemporanea.*

Origo rei inspici debet: The origin of a thing ought to be inquired into. This is true of the mandatory and statutory records. *Melius,* etc. *Regula,* etc. C. v. Hess: 215; Cases. *Verba intentione.*

Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis: The presence of the body cures the error of the name; the truth of the name cures an error of the description. *Falsa; Res ipsa loquitur.*

Præsumatur pro justitia sententiæ: The justice of a sentence should be presumed. Windsor: 1; Clem.: 2; L. C.: 290*a*-299.

Probatis extremis præsumuntur media: The extremes being proved, the intermediate proceedings are presumed. Citizens' Ry. 186.

Quicquid solvitur, solvetur secundum modum solventis: Whatever is paid is to be applied according to the intention of the payer. Field v. Holland: 387.

Qui hæret in litera, hæret in cortice: He who adheres to the letter adheres to the bark. Indianapolis R. R.: 232.

Quilibet potest renunciare juri pro se inducto: Anyone may renounce a law introduced for his own benefit. J'Anson: 91; McKyring: 33; Field v. Mayor: 84; Shutte: 291.

Qui primum peccat ille facit rixam: He who is guilty of the first offense is guilty of the whole strife. Stetson: 163; C. v. York: 197; Lickbarrow: 394; Polhill: 411.

Qui prior est tempore, potior est jure: He who is first, or before, in time, is stronger in right. Freeman: 287.

Qui sentit commodum, sentire debet et onus: He who derives a benefit from a thing ought to bear the disadvantages attending it. Bauerman: 48.

Quod ab initio non valet, tractu temporis non convalescit: What is not good in the beginning, can not be rendered good by time. Sanborn: 61; Boyd: 63; Shutte: 291.

Quod est inconveniens, aut contra rationem non permissum est in lege: What is inconvenient or contrary to reason is not allowed in law. See *Cessante.*

Leading Cases—Principles.

Quod lex non vetat permittit: What the law does not forbid it permits. Cruikshank: 232.

Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est: When there is no ambiguity in the words, then no exposition contrary to the words is to be made. Harper: 218.

Regula pro lege, si deficit lex: Where the law is deficient, the maxim rules. C. v. Hess: 215.

Res inter alios acta alteri nocere non debet: A thing done between strangers ought not to injure those who are not parties to it; or, a transaction between two ought not to operate to the disadvantage of a third. Higham: 213*c*; Price: 213*f*: Strong v. S.: 213*a*.

Res ipsa loquitur: The thing speaks for itself. Kearney: 211.

Rex non potest pecarre: The King (state) can do no wrong. Hunsaker: 259; Lange; 159.

Roy n'est lie per ascun statute, si il ne soit expressement nosme: The King (state) is not bound by a statute unless he is named to be bound. Barron: 241.

Salus populi suprema lex: That regard be had for the public welfare is the highest law. Kingston's Case: 76; Cruikshank: 232; Trist: 214.

Semper præsumitur pro negante: The presumption is always in favor of him who denies. See *Actore, Favorabiliores.* Bonnell: 185.

Simplex commendatio non obligat: Simple commendation is no obligation. See *Caveat.* Pasley: 375.

Summa ratio est quæ pro religione facit: Where the laws of God and of man come in conflict the former shall be preferred. Trist: 214.

Leading Cases—Principles.

Surplusagium non nocet: Surplusage does not vitiate. See *Utile.*

Ubi jus, ibi remedium: There is no wrong without a remedy. Ashby: 273.

Utile per inutile non vitiatur: What is useful is not vitiated by the useless. Kraner: 299; Dickson: 34; Bradbury: 35; Cohens: 244.

Verba (chartarum) fortius accipiuntur contra proferentem: Every presumption is against a composer. Dovaston: 217; Cruikshank: 232. (This maxim applies to all systems. Recognition of this fact is most important. It is denied in many quarters. See notes, Lampleigh: 301.)

Verba generalia restringuntur ad habilitatem rei vel personam: General words must be confined or restrained to the nature of the subject or the aptitude of the person. Bristow: 135; Martin: 246; M'Culloch: 147; White: 140; Dickson: 34.

Verba intentione debent inservire: Words are to be governed by the intention. Harper: 218; Indianapolis R. R.: 223; Rushton: 5.

Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur: Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them. Galpin: 63; R. v. Waters: 70; R. v. Waverton: 71; Cohens: 244; S. v. Moore: 222*a*.

Volenti non fit injuria: He who invites his own injury shall not be heard to complain of it. Stokes: 207; Seabury: 281; Edwards: 282; Maclay: 327. *Nullus commodum,* etc.

What ought to be of record must be proved by record and by the right record. Iverslie: 46. Windsor: 1-46.

Where one of two equally innocent persons must suffer from the fraud of a third he who first trusted must first suffer. Lickbarrow: 394. *Volenti.*

DATUM POSTS

LEADING AND ILLUSTRATIVE CASES

1. WINDSOR v. McVEIGH (1876), 93 U. S. 274 (23 L. ed. 914), 4 Cent. L. J. 68; Keele, 118 Mo. Ap. 262-280 (quoting). Hughes' Proc., §§ 54-70; Brown, Jurisdic., Freem. Judg., *q.v.*, Van Fleet, Coll. Att. 386, 62 Ark. 444, 54 Am. St. 302, 39 L. R. A. 449, Foster, Fed. Prac., stated, Van Zile, Pl. 286; Yentzer, 10 Colo. 63; Russell v. Shurtleff; Hovey, 167 U. S. 409, 42 L. ed., 215: cases (due process of law signifies a right to be heard in one's defense. 145 N. Y. 126, 39 L. R. A. 449); Davidson; Wilson, 169 U. S. 586, 42 L. ed. 865, n.: cases; 65 Am. St. 147, n. See Pettibone, 203 U. S. 192, *post.*

Cited: pp. 5, 6, 9-11, 15, 17, 22, 23, 29, 30; §§ 1-13, 19-38, 44, 49, 51-77, 79, 87, 88-92, 98-101, 104, 109, 110, 112, 121-124, 129, 133, 150-152, 156, 165-169*a*, 173-178, 186, 186*a*, 204, 205, 216, 240, 268, 278, 304, 352, Hughes' Proc.

Cited, §§ 5, 33, 46, 61, 63, 70, 80, 88-89, 93, 95, 104, 108, 115, 118, 124, 128, 132, 152, 157, 159, 164, 169, 170, 177, 186, 187, 192, 201, 201*a*, 203, 204, 214, 218, 220, 225, 237-239, 245, 248, 263, 267, 268, 296, 311, Gr. & Rud.

Windsor stated. Coram judice proceedings essential to sustain a deed founded upon judicial proceedings. Windsor claimed McVeigh's land under a deed made by a United States marshal, upon the authority of a decree entered under the Confiscation Act of 1862 (a civil war measure, providing that the lands of rebels in arms might be sequestered by the government). McVeigh was a soldier in the army of Northern Virginia resisting the armed authority of the federal government. Under that act his land was seized, and monition—summons—was published requiring him to appear and defend, which he did by attorney, who in an answer set forth the above facts, and which were all that were necessary to sustain a decree, and for this it should not have been stricken from the files, as was done upon a motion. To this McVeigh's attorney *made no objection and took no exception,* but withdrew from a court that struck such an answer from the files, *which fact properly appeared from the mandatory record. Consequently no objection or exception was made or reserved, and no bill of exceptions was filed.*

Upon that record a decree was entered; the invalidity of this decree was urged because of the above fact so appearing: and that thereon Windsor bought

Leading Cases.—1. Windsor.

caveat emptor—charged with a knowledge—that the court after summoning McV. to appear and defend, afterward struck his answer from the files, instead of adjudging it insufficient and offering an opportunity for an application for leave to amend. The latter while a matter of discretion with the court was claimed as a substantial right, which could not be disposed of as a trifle (*De minimis*). And that, upon these grounds, the proceedings were *coram non judice.* Justice Field spoke for the court, which held, that the decree was void for the above reasons, and that consequently the deed was of no effect and that the proceedings were open to collateral attack.

Justices Hunt, Miller and Bradley dissenting. See Cooper v. Reynolds; DUE PROCESS OF LAW; WAIVER: cases.

Windsor discusses principles of the greatest consequence, relating to government, jurisdiction, procedure, and fundamental rights. It is the ablest discussion of a leading principle from "the manner of the Romans" and of the Normans which principle is often expressed by the maxim: *Audi alteram partem.* Hughes Proc. 51-77. It unfolds the relations of procedure both to government and to contract; the deed in question was contract; it rested on the Judgment and its foundation, *Clem.*: 2c. Where the foundation fails, all fails: *Debile,* etc.

Windsor also supports the proposition that the study of procedure is a study of government. Cruikshank: 232. Also that the technicalities of the law are its safeguards. The requirements for operating government are necessarily technical. To illustrate, the requirements for the division of state power involve many subtle and technical rules. L. C. 142-146. Titles to land depend upon the deed and all of its technical distinctions, which also depends on judicial procedure and records. These are often vitiated by apparently inconsequential matters. See Placitum: L. C. 49. To illustrate, an infant must be served with process; the service can not be waived as in cases of adults; and it matters not that the Court appointed a guardian *ad litem,* who appeared, filed an answer, and contested the

Leading Cases.—1. Windsor.

case. Galpin: 63. And the record must show the service, by the right, and by a sufficient document. Not only must there be a judgment, but its foundation must appear and be sufficient. Clem: 2c. Likewise where the confirmation of a judicial sale is required, it must properly appear of record. Williamson v. Berry: 65. C. v. Roby: 74. So, also, other important steps must likewise appear. And contract has technicalities as will appear from the subjects, consideration, and assent: but for the defence arising from *Non haec in foedera veni:* I did not come into this compact, contracts could be arbitrarily declared. Tort also has technicalities as appears from the "squib case"; also crime as appears from many cases that will be presented.

Official deeds and titles depend upon the records from which they emanate; the *Windsor* case illustrates that point. A mortgage depending upon a Judgment falls therewith. Mach., 15 So. Dak. 432. 91 Am. St. 698. The examination of the judgment depends upon innumerable requirements, of which many may be judged from the cases that we shall extendedly illustrate with; these will successively follow.

Jurisdiction is one of the most important questions of procedure. See JURISDICTION. Generally it depends upon the mandatory record. Error shown from this record will keep; it saves itself without objection or exception. Windsor; Cruikshank; Perez; Fish v. Cleland; Roden; Planing Mill Co. v. Chicago; Campbell v. Porter; Campbell v. Greer; Mallinckrodt.

Abuse of power calls for no response, objection, exception, argument, or assignment of error from one injured thereby Windsor; Perez; Campbell v. P., L. C. 2; 2 Cyc. 715: Cases. A denial of due process of law, if evinced by the mandatory record is a matter for review without more; it does not need the assignment of error, as does the statutory record. The only exception to the foregoing rule is to secure the review of a cause from the highest state court, when removed into the federal Supreme Court. Winona; see Federal Procedure. That court has burdened the practice of that class of cases so as to charge the practitioner with grave responsibilities and constant anxieties.

Courts are bound by their records, and not by anything else. Without records a court can do as it pleases, as in Asia and Africa. That there may be records there must be pleadings. See Codes; Sto. Pl. 10:235. *De non apparentibus,* etc. Devine; Montana; Jackson v. Ashton.

What is not juridically presented can not be judicially considered. Windsor; Planing Mill Co.

One has the fundamental right to notice, to form an issue and be heard before Judgment. Haddock; Rouse; Pennoyer: 58.

Probata will not supply allegata. Shutte: 291; Cruikshank and following cases. *Verba fortius,* etc. *Frustra probatur;* Borkenhagen: 81. A judgment, without or beyond the allegations and issues shown from the right record is a nullity, as will appear from the following cases. See ALLEGATIONS; ISSUES. L. C. 34-44.

There shall be no departure; variances are not allowed. See IDENTIFICATION. The footing of the theory of the case in several states depends upon a disregard of Windsor, its cognate cases and maxims, and the requirements of the conserving principles of procedure. See §§ 83-123 Gr. & Rud.

Pleadings must exist and they must be sufficient in substance. The ground of the general demurrer is never waived. Hughes' Proc. §§ 7-12. It may be raised at any time and in any way. McAllister: 3; Slacum; C. v. Roby: 74. It may be revived or first raised in a motion of arrest, or renewed or first raised on collateral attack. Codes provide for this practice most minutely. It is due to say cases may be found opposing the above view. Franklin Lodge; 2 Thomp. Tri. 2310, 2311; Weems, 80 Tex. 55.

There are important distinctions between the mandatory and statutory records, which may be learned from Windsor; Munday: 79; J'Anson: 91. See MANDATORY RECORD; ASSIGNMENT OF ERROR.

One must see that his judgment is entered of record. Freem. Judg. 77. See JUDGMENTS; CONSTRUCTIVE NOTICE. One claiming a sequestration must prove it. Horan: 85; Williamson: 65; Williams: 116; Walker: 118; Moser: 125; Pennoyer: 58; Ransom: 122; Windsor: 1; Munday: 79; notes to Lampleigh: 301. He must defend it against collateral attack.

Recording an instrument must be in the proper book to impart constructive notice. Cady, 131 Cal. 552, 82 Am. St. 391, n.; McKenna, 109 Wis. 271, 83 Am. St. 895 (entries must be in the proper record); Iversile: 46; *Expressio unius est exclusio alterius.* One charged with constructive notice is not required to look in odd, strange and new places for information, not even in an answer for what ought to be in a complaint (exceptions to this in some courts), and never to the statutory record for what ought to be in the *mandatory record.* See THEORY.

The supreme court of the United States will not look into an answer for what ought to be in a complaint; nor into a reply for what ought to be in an answer. These views are agreeable to registration of notice, as of deeds, etc. One claiming a lien or a title under a statute must show strict compliance. A sufficient return of an officer must be shown.

Leading Cases.—1. Windsor.

Mathews, 47 N. J. Law, 415; Western, 39 Or. 407; Rockwood, 37 Minn. 533: cases; Williams v. Peyton: 116; Deputron: 121; Douglas 28 Ill. 362 (execution omitted defendant's name).

A jurisprudence administered by intellects respecting the unwritten constitution is one kind, while a jurisprudence administered by those not instructed in the fundamentals of the law, and who do not uniformly respect basic principles is quite a different jurisprudence. The justness of this observation is supported by the condition that has come to several states, the courts of which have attempted to introduce the theory of the case, as advocated by those who may be cited to support the view that pleadings can be waived in courts where pleadings are provided for. From the mandatory record and the maxim *Audi*, and its cognates the fundamental requirements of a defined government may be introduced and explained. Therefrom and therewith will be introduced the prescriptive constitution which is the gift of the Roman and of the Norman races.

Generally, the principles in Windsor are respected and upheld in the federal courts and most of the American states; but not in all of these as will appear from cases hereafter cited. Coke's three degrees of certainty and the three stages of variant construction, namely, before trial, at trial, and after trial have made the decisions of several states a jargon of absurdities. See Dovaston: 217.

2. CAMPBELL v. PORTER (1896), 162 U. S. 478 (40 L. ed. 1044). Cited, § 27, 24, Hughes' Conts., Fost. Fed. Prac. 496. *Cited*, §§ 57, 70, 88-89, 129, 204, 237, 245, 251, Gr. & Rud.

Campbell v. Porter, stated: A plaintiff in an appellate court may raise the objection that the court has no jurisdiction of the subject-matter. Craswell v. Belanger (1896), 56 Fed. 529, 6 C. C. A. 1; 60 Miss. 963; Springer: 24. A consul can object at any time and in any way to the exercise of any jurisdiction affecting him in any court except in the federal courts. There must be allegations, and they must be certain. Rushton: cases; Weil v. Greene County (1878), 69 Mo. 281, 286: Cases (authority must be pleaded). Wabash R. R. v. Young (1904), 162 Ind. 102, 4 L. R. A. N. S. 1091, Lane v. Dorman; Perez; Benton County; Roden; Campbell v. Greer; People's Bank v. Calhoun.

It is the duty of courts to guard their acts and restrain them within their jurisdiction (Windsor; Sto. Pl. 10, 473, n.), keep free of usurpation and abuse of power, and to heed not only the advice of parties at any time and in any way, but also the *amicus curiae*. On principle a witness called may refuse to answer irrelevant questions; he is not bound to tell all he knows of everybody and

Leading Cases.—2. Campbell.

everything. A court will *sua sponte* notice that a verdict departs from the pleadings. Smith v. Burrus. Garland: 60; Ringland, 18 C. B. (N. S.) 301 (114 E. C. L. R.); Bro. Max. 171 q. v. 182; *Debile; De non apparentibus.*

Important and fundamental rules on writ of error or appeal. The first and fundamental question is that of jurisdiction—first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. Campbell; Perez, Great Southern Co., 177 U. S. 449; cases; Giles, 193 U. S. 146; Horan: 85.

Such objection by a court should be considered with the rule that the ground of the general demurrer is never waived. McAllister. See Cooke; Rushton. Another but belated form is a motion in arrest of judgment. Cooke. The last stage of objection is upon collateral attack. Horan: 85. Windsor; Walker: 118. See PROCEDURE.

What is a subject of waiver in procedure is also a subject of express stipulation or contract. Hughes' Conts. 14-18. But there are matters relating to procedure and the establishment of judgments and decrees that cannot be waived, nor stipulated nor contracted away. This view is sustained by Campbell. What it suggests, and also what may be deduced from it, is of the greatest significance to the practitioner and also to those dealing with judgments and decrees, and titles to property founded upon judicial proceedings. From such view-points the importance of the case will appear. See Rushton; *Debile fundamentum*: Bro. Max. 186, 182, 715 (8th ed.); California: 240. COLLATERAL ATTACK; CONSTRUCTIVE NOTICE.

The fundamental rule that consent cannot confer jurisdiction of subject-matter is not given a dignity and operation above consent and acquiescence in all jurisdictions. The force and protection of that rule requires the establishment and recognition of a hard-and-fast line within which assent, stipulation and condonement must be confined and restrained from its impairment and destruction. Wherever this is permited may be traced a great enlargement of the province of contract right and profound disturbances of procedure.

Waiver in procedure has limitations, and these bound and define the right to contract as to matters involving procedure. See § 6, Gr. & Rud.; French v. Miller; Garland: 60. *Consensus tollit errorem; Allegans contraria.*

Decisions in a multitude of jurisdictions may be cited to oppose the rules in Campbell. See Hume: THEORY OF THE CASE.

Elsewhere is stated the influence of

Leading Cases.—2. Campbell.

procedure upon contracts. Windsor; Cutter; Rann; *De non apparentibus.* See STARE DECISIS.

Certainty and protection depend upon a definite theory of construing and admistering the laws. See PROCEDURE.

At all times a leading question is: How will a court construe and enforce? Therefore all that relates to those questions must be taken into account and be comprehended. See §§ 27, 28, Hughes' Conts.; Perez; Haddock.

Averment of amount in dispute waived if not objected to in the lower court. Jackson v. Giles (1903), 189 U. S. 475 (Harlan, J., dissenting). *Contra:* Holt, 176 U. S. 68, 70; U. S. v. Sayward (1895), 160 U. S. 493; McAllister.

Fundamental error appearing upon the mandatory record needs no objection, exception, protest or statutory record, or assignments of error. It may be raised at any time and place, and of course in an appellate court. M., K. & T. R. R., 92 Tex. 501: cases; McAllister; Windsor.

Pleading—waiver of objections to petition. The objections to a petition that a court has no jurisdiction over the subject-matter, and that the petition does not state facts sufficient to constitute a cause of action, cannot be waived. Marks Co., 168 Mo. 133, 90 Am. St. 440, 56 L. R. A. 951. ALLEGATIONS; AIDER.

Jurisdiction; consent to and waiver of. Jurisdiction of the subject-matter of a suit cannot be conferred by consent; neither can the want thereof be waived. Conant, 23 Utah, 627, 90 Am. St. 721, n. See JURISDICTION.

Pleading essential in the removal of causes, Expressio unius, etc., *De non apparentibus,* etc. When the right to remove a cause depends upon the nature of the controversy and the questions to be litigated, the complaint alone is to be considered for the purpose of ascertaining the controversy and the questions involved; and although the defendants may by their pleadings introduce new matter and raise additional questions, they cannot so change the case as to make it cognizable in a federal court, if it was not so when commenced. Doremus v. Root (1899), 94 Fed. 760.

The grounds of removal must be disclosed and also from the plaintiff's pleadings alone. Walker, 167 U. S. 57; Chappell, 155 U. S. 102. Facts must juridically appear before they can be judicially considered. Doremus, *supra.*

Description of a cause of action is essential to confer jurisdiction. See CAUSE OF ACTION. Wabash R. R. (Ind.); Benton.

Overruling general demurrer will keep without exception. Mallinckrodt (Mo.).

2a. CAMPBELL v. GREER (1896), 197 Mo., 463-466; S. P. Windsor; Campbell v. Porter.

Pleadings are the foundation, are the authority to support a judgment; and for its support they must exist. Clem. If the pleadings are lost they must be supplied. Iverslie.

Leading Cases.—2a. Campbell.

Stipulations for contracts of the parties to a record can not dispense with pleadings. People's Bank v. Calhoun. The mandatory requirements of a constitutionalism can not be waived. Lane v. Dorman. Hughes' Conts., 14-18; §§ 59-61, Gr. & Rud.

A judgment has no effect or validity in proving title founded thereon, or an estoppel of record until its authority is shown. Clem. An authority must be pleaded. See JUSTIFICATION.

2b. CLARK v. SIRES (1905), 193 Mo. 502-517.

The presumption of regularity will not supply an omitted jurisdictional fact from the right record. Hannah: 128. There are limits of liberal presumptions; Ricketson: 59.

Confirmation of judicial sales is essential, and it must appear of record and plainly so. Clark; Williamson: 65.

"What ought to be of record must be proved by record, and by the right record." Windsor; Crain.

2c. CLEM v. MESEROLE (1902), 44 Fla. 234, 32 So. 815, 103 Am. St. 145, n.

Cited, §§ 59, 61, 119, 124-125, 138, 143, 149, 201, 201*a*, 268, 270*a*, 272, 286, Gr. & Rud.

The judgment and its foundation necessary to prove estoppel or title founded thereon. §§ 124-125, Gr. & Rud.

Evidence; judgments as evidence include the mandatory record. In *res adjudicata* and proving a title founded on a judgment, not only the judgment but its essential record besides must be introduced. The word "judgment" includes the record upon which it is founded. *Expressio eorum,* etc.; Clem; Vail v. Inglehart (1873), 69 Ill. 332, 334, citing Steph. Pl. 24, *et seq.;* Freem. Judg. 51, 75; Mayer v. Brensinger (1899), 180 Ill. 110, 121; Ingham v. Crary, 1 Pa. 389-394; 1 Whart. Ev. 824; cases; S. v. Hawkins (1882), 81 Ind. 486 (all of the record but not the statutory record must be introduced. Elliott, J.); Brown v. Eaton (1884), 98 Ind. 591; Hargis v. Morse (1871), 7 Kans. 415 (Brewer, J.), 197 Mo. 463. See Missouri; Piper; 114; Cases.

An authority must be pleaded is an old and well settled rule. Jurisdiction is authority and it must be affirmatively shown, and both of the person and of the subject-matter. For the former, either the process or a general appearance must be shown; for the latter the pleadings, which are to show the particular subject-matter adjudicated. *De non apparentibus.*

From the mere judgment entry of no court, not even of the superior, will it be presumed the court had jurisdiction before these facts are alleged and proved. Horan: 85. In the above cases, namely, *res adjudicata* and proving a title founded on a judgment, there are no presumptions of regularity. The record can neither be supplied nor patched out by liberal construction. Estoppels are odious. Every presumption is against a pleader. Dovaston:

Leading Cases.—2c. Clem.

217. *A fortiori* where one is both estopped and loses his property by a proceeding, all intendments are in his favor.

The dissenting opinion in Clem v. Meserole, that the rule applies to judgments of inferior or statutory tribunals is not justified. The rationale involved was misconceived.

The rules in *Omnia præsumuntur rite esse acta, Probatis extremis præsumuntur media* and *Res ipsa loquitur,* may be considered with the above cases.

The rule in the federal courts may be picked out of Pennoyer, Windsor and Galpin: 63.

Inferior and statutory tribunals generally have no files. Crepps; Piper; 113-114; Cases. Their records must show *affirmatively* that the court had jurisdiction. This distinction from superior courts exercising a general jurisdiction should be well comprehended. Crepps: Cases. Rice v. Travis (Ill.). See COLLATERAL ATTACK: Cases.

In Illinois the entire record must be introduced, but if not inconsistent therewith jurisdictional facts will be presumed, *e. g.,* that the defendant was properly served with process. Harrow v. Grogan (1906); Ricketson: 59. Kenney v. Greer (1851), 13 Ill. 432, citing Kempe v. Kennedy, Borden v. Fitch and Bloom v. Burdick, introduces singular and erratic distinctions and refined discussions relating to superior and inferior courts. S. P. Benefield v. Albert (1890), 132 Ill. 665; Wallace v. Cox (1874), 71 Ill. 548. To support presumptions of continuity the record must be regular. Swearengen v. Gulick (1873), 67 Ill. 208, note; 28 Am. St. 87. *Omnia præsumuntur rite,* etc.

Records—Pleadings if lost must be supplied. 197 Mo. 463. See Missouri.

Præsumatur pro justitia sententiæ: The justice of a sentence shall be presumed. Windsor (matters shown *de hors* the judgment entry may invalidate the judgment, not only in appellate procedure but wherever the record is offered to prove either an estoppel or a title founded thereon).

Campbell v. Porter. (Any one, not only parties to the record, but an *amicus curiæ,* may suggest to a court that its proceedings are *coram non judice.* In other words, one may demur to his own pleadings.)

Clem (wherever a judgment of any court, of any grade, superior or inferior, general or limited, is offered to prove an estoppel of record, it must be attended by the mandatory record to support it. An authority must be shown; it must be alleged, and if denied, then proved. The rules of *res adjudicata* are consistent with the rule in Clem). And this rule is *De non apparentibus et non existentibus eadem est ratio* (what is not juridically presented cannot be judicially considered). A part of the latter rule is *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged); also

Leading Cases.—2c. Clem.

that *allegata et probata* must correspond. Presumptions will not supply the mandatory record where one claims title or an estoppel thereon. As to the statutory record, it is for an appellant and it is to be used in an appellate court only. As to this latter record *Consensus tollit errorem* (consent will not waive error) and *Præsumatur pro justitia sententiæ* have their greatest applications. To this latter record these maxims are most liberally applied).

U. S. v. Cruikshank (the omission of an essential pleading, or still further of a single essential allegation, will constitute the proceedings *coram non judice. Debile fundamentum fallit opus:* Where the foundation is lacking all goes to the ground).

Rushton: (same point as in U. S. v. Cruikshank).

Munday (ordering a trial without an issue constitutes a *coram non judice* proceeding).

Crain v. U. S. (same point as Munday. The rule applies as in all cases alike. The rule is dictated by the conserving principles of procedure).

The maxim of regularity is not universal in its application. *Omnia praesumuntur rite et solemniter esse acta* is not a universal rule. Crepps: 113. In judicial matters it is not applied so as to dispense with the mandatory record of any of its necessary parts. For the basic—the constitutional rule—"what ought to be of record must be proved of record and by the right record." Planing Mill Co. v. Chicago; Roden (Mo.), is fully conserved and respected before the presumption of regularity is given any place. Accordingly, it appears that the conserving principles of procedure are safeguards and vindicated by courts as a first duty—as a primal obligation imposed by government for its means and existence. The rights of the individual are secondary; the public, the government is first and above all. Private inconvenience is made up for the public good. *Salus populi suprema lex.* Where essentials are involved, where substance is sought, there applies *De non apparentibus et non existentibus eadem est ratio* (what is not juridically presented cannot be judicially considered). For protection under this, the *coram judice* rule, there ever attends for the construction of the record, the rule *Verba fortius accipiuntur contra proferentem* (a record is construed against him who produced it or who seeks to establish a title or an estoppel of record upon it). Williamson v. Berry: 65; Clem, *supra.*

The foregoing views involve the theory, the structure and the nature of government. Governments accusatory in form and nature must respect the foregoing canons of pleading here, of evidence there, of practice yonder, and of construction elsewhere, which is above and beyond, the ever attending ally and "metwand" of all. Here is an illustration of the way that the various subjects and branches of the law inter-

Leading Cases.—2c. Clem.

weave and interlace. The law is an entirety. The study of procedure is a study of government. U. S. v. Cruikshank, *supra;* Blake v. McClung, 172 U. S. 232. Impairment or denial of the foregoing principles is an attack upon a constitutionalism.

Inseparably connected with the foregoing is the question of what can be and what cannot be waived. This involves what need not be assigned for error and what must be assigned for error. Windsor, *supra;* Campbell v. Porter, *supra;* Perez; Roden; Planing Mill Co., *supra.* This brings with it for consideration the maxim *Consensus tollit errorem* (waiver of error condones it). Its limits extend up to and against what is a ground for collateral attack, or at an earlier stage, a ground for arrest of judgment, or at still earlier stages, a ground for general demurrer. As to these grounds, there need be no assignment of errors; whatever is a ground for collateral attack, a court will *sua sponte* take notice of and act upon because the conserving principles of procedure or of government are involved. Whether or not there exists a government of limited and defined powers depends upon its procedure. What this is depends upon the judiciary and whether or not it is lured and led astray by the euphemism called the theory of the case.

The above use of the maxims shows how clearly they set forth the principles of the law and we believe also shows as clearly that it is very important to keep them impressed by their constant use. All experience shows there ever must be some *datum* posts, from which to reckon. The greatest legal minds of the Roman and of the Norman, of all the ages have observed and built around them. Ulpian, from whose works two-thirds of the pandects were derived, preserved them. Bacon saw with an all-comprehensive eye their utility. Mansfield conserved them for the purpose of clarifying the laws in his day and Story used them in his incomparable works. Every truly fundamental work must employ them for the varied reflections they ever afford. They suggest much that relates to the morality, the simplicity, the intensive-usefulness, and the history of the law.

2d. PLANING MILL CO. v. CHICAGO (1870), 56 Ill. 304: Cases.

Cited, §§ 59, 96, 101, 118, 124, 128*a*, 138, 165, 175, 199, 201*a*, 203, 210, 224, 229, 236, 243, 267-269, 272, 278, 297, Gr. & Rud.

Mandatory record is exclusive in its functions. Expressio unius, etc.; Wright v. Griffey (statutory record exclusive). Many cases in Missouri support this view. 199 Mo., 150, 159, 167, 255, 256-258, 278. Collateral attack. *Placitum—necessity thereof.* Where the record in the court below, as shown by the transcript filed in this court, contains no *placitum* or convening order of the court, such defect is ground for reversal. *Same—whether aided by bill of exceptions.* Nor could the defect

Leading Cases.—2d. Plan. Mill Co.

be aided by the bill of exceptions. A bill of exceptions is really and practically no part of the record till after judgment, and it would be a perversion of its uses to make it aid the defects of the judgment record.

Bill of exceptions should be sealed by the judge who tried the cause.

Courts will first consider the conserving principles, before they will the rights of the parties litigant. Austin R. R. v. Cluck.

Exhibit attached is no part of a pleading. Pearsons v. Lee (1835), 1 Scam. 193; Allegations in Caption insufficient, are surplusage. Jackson v. Ashton (U. S.).

2e. PEREZ V. FERNANDEZ (1906), 202 U. S. 80-101.

Jurisdiction of subject-matter can not be waived. The court *sua sponte* may raise the question, Campbell v. Porter. Where a court *a quo* had no jurisdiction, the court *ad quem* acquires none. Horan: 85.

Perez stated: A Porto Rican court was required by local law to assess damages on an attachment bond along with the trial of the attachment issue. But instead, it permitted the attached defendant to bring an independent suit on the bond for damages, who recovered thereon. The cause was removed by error to the Federal Supreme Court, which held that the failure to assess the damages on the bond, was fatal to prosecuting an independent suit therefor, and that there was no jurisdiction of *subject-matter* in the second suit, and that the court would *sua sponte* notice this defect; that it could be raised at any time and in any way; that the mandatory record presented it and that this was sufficient. Campbell; Windsor. That neither objection nor exception was necessary. (See Winona; Howard v. Fleming.) When a directory statute is construed mandatory remedies are defeated. J. J. White and McKenna dissenting. See Beeze v. Haley: Hughes' Proc. Hahl v. Sugo; Davidson v. New Orleans. *Cujus est instituere ejus est abrogare.*

What might or should have been decided is presumed to have been. See *Res Adjudicata.* Splitting causes of action is not permissible. *Interest reipublicæ ut sit finis litium.* Perez is considered a very instructive case for reasons stated under Windsor: 1.

2f. DAVENPORT V. FARRAR (1836), 2 Ill. 315.

Cited, §§ 59, 88, 113, 117-124, 278, Gr. & Rud.

Davenport stated: Dower can be assigned in an estate of inheritance only. Under a statute for assigning dower the statement therefor averred that the husband was *joint owner* and *proprietor* with others. The power—jurisdiction of the court to act—depended upon these words; thereon it ordered the assignment. From this there was an appeal, where the court refused to construe the words *owner* and *proprietor* to mean more than a mere possessory or equitable right.

Leading Cases.—2f. Davenport.

Every presumption against the pleader was applied. *Verba fortius accipiuntur contra proferentem;* Harrow v. Grogan; Lonstorf; Dovaston: 217.

"When a party comes into court of justice, it is incumbent upon him to exhibit a right to recover in clear and legal language, otherwise the court cannot grant the relief sought." Fish v. Cleland; Pain; 107; Sto. Eq. Pl. 253*a*; Montana; Devine v. Los Angeles.

A sufficient pleading is jurisdictional. If this is lacking, proceedings founded thereon fail. *Debile fundamentum fallit opus;* Moore v. C.: 21; Munday: 79; Guedel v. P.: 74*a*; Fish v. Cleland; Campbell v. Porter: 2. See Franklin Lodge, which opposes the above cases.

This case shows that a pleading is construed from the nature of a subject-matter.

3. **McALLISTER v. KUHN** (1877), 96 U. S. 87 (24 L. ed.). Cited, §§ 6, 8; Hughes' Proc.; §§ 242-256, Gr. & Rud.; 120 Ga. 118, 102 Am. St. 118-124.

Cited, 49, 89, 90, 164, 199, 201, 204, 242-256, 268, Gr. & Rud.

Default does not waive substantial defects. Upon a writ of error to reverse a judgment by default, such defects in the declaration or complaint as could have been taken advantage of before judgment by general demurrer may be brought under review.

The ground of the general demurrer is never waived. If the judgment would have been arrested on motion, because the declaration did not state facts sufficient to constitute a cause of action, it may, for the same reason, be reversed upon error. Slacum. *Cf.* Buchanan; Weems; Rosen v. U. S.; U. S. v. Cruikshank; Bouv. Dic.: Departure (ground of general demurrer may be waived).

Objections of substance may be raised at any time and in any way. Cf. Mutual reserve Ass'n. v. Phelps (1903), 190 U. S. 147 (if a state court had jurisdiction of a subject-matter under general law, its defects can not be raised by collateral attack in the Federal Supreme Court). See Howard v. Fleming: Cases. Franklin Lodge.

The ground of the general demurrer may always be raised, and orally: It cannot be waived. The court will *sua sponte* notice it. Campbell; Cruikshank (motion in arrest of judgment). See DEPARTURE; ALLEGATIONS; CAUSE OF ACTION; SLACUM.

4. **HOPPER v. COVINGTON** (1886), 118 U. S. 148, 30 L. ed. 190, 6 Sup. Ct. Rep. 1025; Abb. Sel. Cas. Pl. 106.

Cited, §§ 203, 207, Hughes' Proc. Cited: 132, 245, Gr. & Rud.

Omission of descriptive allegations is a fatal defect. See JURISDICTION.

"The averment, that the defendant is a municipal corporation under the laws of Indiana, with full power and authority, pursuant to the laws of said state, to execute negotiable commercial paper, is inconsistent with the public laws of the state, of which the courts of the United States take judicial notice. The averment that the bonds held by the plaintiff were executed pursuant to the laws of the

Leading Cases.—4. Hopper.

state, is but a statement of a *conclusion of law,* which is not admitted by demurrer. The declaration is fatally defective for not stating the facts necessary to enable the court to judge for itself whether that *conclusion of law* has any foundation in fact."

Conclusions of law unavailing for any purpose. They can not be aided. Cruikshank, 13 Wall. 166; Craigin, 109 U. S. 194 (citing *Rushton v. Aspinall*); Kennard, 3 Dillon, 147; Broome, 76 N. Y. 564; Cotton, 47 N. J. L. 401.

Conclusions of law are a nullity, and will not avail. Hopper; Cruikshank. *Are not aided by a denial.* Foster, Fed. Prac. 146. Nor by a demurrer, nor by a default. Hopper. See AIDER.

A judgment resting on a bad statement of "a cause of action," and also a default, will be set aside on a writ of error—review. Hopper; McAllister; Perez.

Demurrer admits only facts well pleaded. Hopper. It does not admit the pleader's conclusions and construction. Greeff, 160 N. Y. 19, 73 Am. St. 65-69, 46 L. R. A. 288. DEMURRER. L. C. 42.

An authority must be pleaded. And. Steph. Pl. 355. The right—the power—of a municipal corporation to issue bonds must be set forth. The facts showing the authority must be pleaded. Conclusions will not do. Hopper. Authority to issue bonds must be given by law; the power must exist in fact. See JUSTIFICATION; *Res adjudicata.*

5. **RUSHTON v. ASPINALL** (1781), 2 Doug. 679, 1 Smith, L. C. 1445-1454, omitted in 9th ed., also from 10th and 11th Lond. eds.; reprinted in Bartlett, and cited and followed in *Williams v. H. Co.;* Cragin v. Lowell, 109 U. S. 197. S. P. Hopper, stated, Wade on Notice, 1401; Hughes' Proc.

Cited, §§ 53, 70, 88, 89, 109, 111-113, 119, 124, 142, 143, 162-164, 175, 182, 187, 192, 201*a*, 202, 223, 224, 230-232, 237, 245, 278, Gr. & Rud.

Rushton stated: The holder of a bill of exchange sued an endorser thereon, but did not allege a demand and refusal by the acceptor to pay it on the day it was payable. Plaintiff further failed to allege that notice of the dishonor of the bill by the acceptor was given to the defendant, as is required in the law of commercial paper. Because of those omitted allegations, respectively, no "cause of action" was shown against the defendant, therefore the judgment was arrested.

The omission of an essential allegation cannot be supplied from the evidence, or by inference. *Frustra probatur quod, probatum non relevat:* 21, 232.

Aider by verdict; limitations of rule of liberal construction. Rushton: 12, 14, 70, 71; Dobson; Bowman v. P.; Aider 2 Cyc. 689-691.

Spieres (or Spiers) v. Parker (1786), 1 Term Rep. 141-146 (D. & E.), 1 R. R. 165; 6 Mews' E. C. L. 598, cited and approved in Williams v. Hingham, also in Bartlett, S. P., Cruikshank; Rushton; 1 Gr. Ev. 19; 1 Chit. Pl. 711-713; § 53 Gr. & Rud.

Leading Cases.—5. Rushton.

Nothing to be presumed after verdict but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. Slacum; Dobson; 1 Gr. Ev. 19; R. v. Goldsmith, 20, 70, 71.

In Spieres, Mansfield, Ashhurst and Buller spoke and confessed they could find no authority to uphold a judgment resting on a declaration omitting a material allegation. Weil v. Green; Campbell v. Porter.

Fisher v. Langbein (1886), 103 N. Y. 84, Erwin, Cas. Torts, 269. *Allegations essential to resist collateral attack,* and to protect attorneys and others acting under the proceedings: "It seems where the jurisdiction of the court is made to depend upon the existence of some fact of which there is no proof, it has no authority in the premises; and if it, nevertheless, proceeds, all of its acts are void and afford no justification to the party instituting the proceedings, or to an attorney who causes process to be issued in such proceedings." Fisher; Savacool; Buck v. Colbath; Tarble's Case: 247; Slacum; Malicious Prosecution; False Imprisonment. COLLATERAL ATTACK; *Debile fundamentum.*

Evidence of a distinct substantive fact without an allegation on the record not received. Smith v. Clarke (1806), 12 Vesey, 477, 8 R. R. 359, 33 Eng. R., 6 Mews' E. C. L. 801; Scott v. Sampson (1882), 8 Q. B. D. 491, 6 Mews' E. C. L. 800 (Justification facts in defamation not pleaded can not be proved): Cases. Malcolmson v. Clayton (1860), 13 Moore, P. C., 198, 15 Eng. R. 74, 6 Mews' E. C. L. 802. And likewise of defenses. Perrse, 7 Clark & F., 279, West, 110, 7 Eng. Rep. 1073; Atwood v. Small (1835), 6 Cl. & F., 232, 7 Eng. Rep., 685, 6 Mews' E. C. L.; 801: Cases. Fish v. Cleland; Cruikshank; Mallinckrodt: 12*a* (Mo.); 2 Cyc. 691, 715; 2 Cent. Dig. Appeal, § 1223.

A petition to remove a cause to divest and to confer a jurisdiction must set forth facts showing a right under the constitution. Galveston R. R., 170 U. S. 226, 42 L. ed. 1017, n.; Craswell: 10. Conclusions of law will not do. Green: 90 (code); Hanford: 86.

There must be a cause of action alleged, and to this applies Expressio unius, etc.; Bristow; Cruikshank: 135, 232.

"Due process of law" requires "regular allegations." Murray v. H.: 219; Cruikshank. These words are not used to fill up, for "sound," for "euphony." Galpin: 63.

Every presumption is against a pleader, Verba fortius, etc.; *Ambiguum,* etc.; Dovaston: 217; Cases. See Hughes' Procedure: Cases.

Codes have not changed the rule in *Rushton.* Andrews v. Lynch (1858), 27 Mo. 167. Essential requirements can not be waived. Mallinckrodt: 12*a*. Windsor and following cases state the rule of the Code. The Code is founded on fundamental principles. Bliss Pl. 41. *Verba fortius,* applies to all defined systems.

Leading Cases.—5. Rushton.

Perhaps the most exaggerated notions of the scope of the Statute of Jeofails are to be found in Missouri. The 8th clause of the 1845 statute of Missouri, provided that defects which could be taken advantage of by "special" demurrer, should be cured by verdict. This was nothing but a reaffirmation of the common law, and is in perfect accord with the present English Judicature Act. But in 1855, the Missouri Statute of Jeofails was amended (see the statute quoted, 105 Mo. 469) by striking out the word "special" and thus attempting the impossible—the cure of inherent jurisdictional defects. Legislatures can not validate void judgments; they cannot escape the necessities of justice, constitutionalized as "due process of law." The true rule is laid down in 1 Gr. Ev. § 19, and cannot be departed from. This attempt of the Missouri legislature has misled her lawyers, beclouded her jurisprudence, and disrupted the due administration of her laws. Contrast 69 Mo. 281 with 105 Mo. 455. According to the former, a fatally defective petition is incurable; according to the latter under one cause of action stated, recovery may be had on another not stated. This matter is elsewhere herein referred to, Indianapolis: 223. The whole subject can be mastered by a study of *Rushton; Bristow:* 135; *Dovaston:* 217; *Dobson:* 232*a;* 1 Chit. Pl. 703-716. And bearing in mind that the Statute of Jeofails as construed by intellects familiar with the immutable constitution of the Roman and Norman, is only an affirmative statute. Rushton; Windsor.

Certainty is reckoned from the conserving principles of procedure; these are *datum posts.* What is sufficiently certain is a judicial question which involves construction. Legislatures cannot prescribe rules of construction for courts. Codes, statutes, merely reaffirm the older laws. Bliss Pl. 141. Those familiar with the maxims and illustrations of the application of them in the cases construe from the maxims without regard to cases or statutes, and come to sound conclusions in obedience to those maxims. The letter of statutes must be set aside. All reckonings are from the conserving principles. Hughes' Proc., pp. 8-14. The rules of procedure interact with these conserving principles. *Concordare leges legibus est optimus interpretandi modus.* It is presumed that legislatures except fundamental law and its essential requirements in all their acts. *Verba intentione debent inservire.* § 28, Hughes' Proc. The common law ever attends and limits or expands legislation. C. v. Hess: 215.

6. **BARTLETT v. CROZIER** (1820), 17 Johns, 448, 8 Am. Dec. 428-442, n. Cited 114 Ill. 475, §§ 13, 23, 28, 30, 78, 104, 348, Hughes' Proc.

S. P. Rushton (which is quoted and followed); Williams presents other cases; these cases support a basic rule, and which is reaffirmed in codes. Rushton; Sto. Pl. 10; *De non apparentibus.*

Leading Cases—6. Bartlett.

An officer who neglects to perform a public duty and thus causes an injury to one is liable for it. Bartlett; Cool. Torts, 408, n.; Dill. Corp.; Beach, Pub. Corp.; Mech. Pub. Off.; Cool. Const. Lim.; Whart. Neg.; Shear.; Bailey v. Mayor; Hill v. Boston.

Public officers liable for a neglect of duty. Bro. Max. 197; C. v. Coyle, 160 Pa. 30, 40 Am. St. 708-714, n. (indictment of commissioners for criminal neglect, and thereby causing death of infant in poor-house); R. v. Morby; R. v. Conde. Cited, § 22, Hughes' Conts.

7. WILLIAMS v. BINGHAM TURNPIKE CO. (1826), 4 Pick. 341, 344. *Verba fortius.* 1 Chit. Pl. 705; 114 Ill. 475.

S. P. Rushton; Moore v. C. (Shaw); C. v. Child (1832), 13 Pick. 198. In the last case Shaw, J., gives an able statement of the rule, and we cite this case to connect Mansfield, Kent and Shaw with the establishment of a great universal fundamental. *De non apparentibus,* etc.; Dovaston: J'Anson: 217, 91. The requirements of criminal cases are the same. James v. Bowman; Huntsman v. S: 231; Cruikshank; R. v. Thurstin; R. v. Waters: 70.

Statutory rights must be strictly pleaded. Suth. Stat. 368, 399, 400. An omitted allegation is fatal. Williams. And this rule is applied in all cases. Van Leuven. See WAIVER.

The same rule applies to U. S. courts. Runkle; Brown v. Keene (1834), 8 Pet. (U. S.), 112; Craswell: 10. See Harvey: 123.

Omitted allegations are fatal to statutory proceedings. Suth. Stat. 393; Van Leuven (also in all cases alike); Cruikshank.

8. CLYDESDALE BANK v. PATON. Appeal Cases (H. of L. 1896), 381, 7 Mews' E. C. L.

A written statement of a cause of action essential:

"By the precision of the Scotch pleading there is still a necessity to set out the real cause of action, which is capable of definite and precise statement, which I regret to say is no longer the case in English pleadings. I therefore speak with some degree of envy when I say that, at all events, the Scotch jurisprudence has preserved something like a system in which a definite and precise allegation of the cause of action is required to be set out before a litigant is allowed to incur considerable expense in proving what may after all turn out to be no cause of action at all." See Rushton.

A court should declare and define issues before a trial is directed. Gay: 138; Kollock.

The above observations relating to the English judicature act should be compared therewith. It is like other codes.

9. AUBURN & O. CANAL CO. v. LEITH (1847), 4 Den. (N. Y.), 65; Ames, Cas. Torts, 31. Cited, §§ 240, 283, Hughes' Proc.

Ore tenus demurrer may be argued after answer and plea at any time. Substance cannot be waived. *Auburn;* Rushton; Bartlett, *post;* Williams v. H.; R. v. Wheatley; Moore v. C.; *De non apparentibus,* etc.

Leading Cases.—9. Auburn.

A special demurrer is waived by filing answer, but ground of general demurrer may be raised at any time and in any way. Auburn; Rushton; Pom. Rem.; Bliss, Pl. 422, 436; Hopper; Woodside, 8 Colo. Ap. 514. *Contra,* Id. 190, 284, 285.

Demurrer and answer will not lie to same statement at same time. And. Steph. Pl. 323. Duplicity must be avoided; inconsistency is abhorred; one cannot raise a question of law and of fact to the same matter at the same time. *Allegans contraria,* etc. The Statute of Ann will not permit this. Auburn.

A general demurrer searches the whole record. Auburn; Bliss, Pl. 422. And may be added to on argument, and after successive hearings, and for a first time in an appellate court. Campbell v. P.; McAllister.

The ground of the general demurrer and of the motion in arrest may be raised on collateral attack, and even when a record is pleaded for *res adjudicata* purposes, where the rule is that the proceedings must be *coram judice.* Bro. Max. 180, 182, 347, 349, 715; U. S. v. Perez; McAllister; Rosen: 93. See Windsor.

10. CRASWELL v. BELANGER (1896), 56 Fed. Rep. 529, 6 C. C. A. 1, Fost. Fed. Prac. 328*a.* Cited, §§ 22, 37, 78-80, 240, Hughes' Proc.

Cited, § 119, Gr. & Rud.

Allegations of citizenship is jurisdictional in federal courts, and it must affirmatively appear and be averred with certainty. Craswell; Morris v. Gilmer (1889), 129 U. S. 129-131; Fost. Fed. Prac. 19, 352, 393; Roberts v. Lewis (1892), 144 U. S. 653-658; Thomas v. Board.

Alleging one is a citizen in a petition for the removal of a cause is not certain. It does not allege that he was a citizen when the suit was commenced. Craswell: Cases. *Verba fortius,* etc.

There must be allegations and they must be certain. Continental Insurance Co.; Fost. Fed. Prac. 66, 369. False allegations of citizenship may be inquired after by the court. Morris; Fost. Fed. Prac. 352.

Courts will *sua sponte* take notice of the absence of allegations. Every presumption is against a pleader. Craswell; Campbell v. P.

10a. THOMAS v. BOARD OF TRUS-TEES 1904), 195 U. S. 207, §§ 22, 23, 38, 187, Hughes' Proc.

Cited, §§ 119, 267 Gr. & Rud.

Affirmative allegation of citizenship is essential to confer jurisdiction upon federal courts. Craswell: 10.

"Jurisdiction of a circuit of the U. S. must affirmatively appear from distinct allegations, or facts clearly proven, and is not to be established argumentatively or by mere inference, and when jurisdiction depends on diverse citizenship, such must appear from sufficient averment, or of facts in the record, showing such diversity is fatal, and the defect can not be waived by the parties, nor can consent confer jurisdiction."

De non apparentibus, etc. *Frustra probatur quod probatum non relevat; Verba for-*

Leading Cases.—10a. Thomas.

tius; Campbell v. Porter: 2; Montana.

Alleging one is a citizen in a petition for removal does not allege he was a citizen when the suit was commenced. *Verba fortius;* Thomas: 15.

Allegations for jurisdiction. See ALLEGATIONS; Kolz, 200 U. S. 76; Jackson v. Ashton (in caption will not do); Windsor: 1.

10b. MONTANA CATHOLIC MISSION v. MISSOULA COUNTY (1905), 200 118, cited, §§ 88, 96, 99, 118, Gr. & Rud.

Jurisdiction of federal courts depends on certain and definite pleadings. A cause of action must be stated according to the rules of good pleading. It must appear from a written statement, in legal and logical form; otherwise there is nothing for jurisdiction to attach to. See JURISDICTION; ALLEGATIONS: Kolze v. Hoadley, 200 U. S. 76; Thomas v. Board. Allegations in caption will not do. Jackson v. Ashton: 33 U. S. 148. See CAPTION.

11. VADAKIN (OR VADIKIN) v. SOPER (1826), 1 Aikens (Vt.), 287, Cas. 142-145, ext. n., And. Steph. Pl. 228, Smith, Conts. 196, n. *Verba fortius,* etc.

Aider by verdict; formal defects are cured by. Rushton; Voorhees v. Bank. But not substantial. McAllister; Hitchcock; C. v. Robey: 74; Dobson.

Jurisdictional facts are not supplied by intendment. Vadakin; Hannah; Rushton; Borkenhagen; J'Anson; Van Leuven. See THEORY OF THE CASE; Arrano Case, *sub,* Thomas v. Mackey: 16; *Omnia præsumuntur rite,* etc.

Consideration; antecedent debt. An indebtedness to three jointly will not support a promise to one for his portion. See Bainbridge; Rann; Lampleigh. Anything more than words is a consideration. Bainbridge; Depeau.

12. HITCHCOCK v. HAIGHT (1845), 7 Ill. (2 Gilm.), 604. Motions in arrest of judgment; motions *non obstante veredicto;* repleaders, distinctions. Repleader. Garland: 60. And. Steph. Pl. §§ 109, 110 (Tyl. ed. 157-166). A verdict cannot help an immaterial issue. Hitchcock. A motion in arrest of judgment is a general demurrer, except that it is a last pleading, and the party pleading it is not entitled to his costs; he loses these for his tardiness. And. Steph. Pl. 109, 110 (Tyl. ed. 166). Like the general demurrer, the motion in arrest is never waived. It naturally belongs to the mandatory record. However, it is held that it is waived if incorporated therein. 199 Mo. 159.

Omission of any material fact is a ground of demurrer, as in Rushton, Cooke, Moore v. C., and R. v. Wheatley. And is also a ground for arrest. *Debile fundamentum.* Collateral attack. Notes, Lampleigh; Dovaston; Cruikshank; Bowman v. P.; Fish v. Cleland.

Courts that order a repleader *sua sponte* take notice of defects in the mandatory record. Garland; Campbell v. P.

From Hitchcock much may be deduced. The principle in Rushton was recognized several times in Illinois in Breese's Report; and R. v. Wheatley was set out in

Leading Cases.—12. Hitchcock.

full at p. 104. Bristow: 135 is fully and extremely embraced. See also Israel: 83. However, inconsistent cases can be found in that State. See Munday: 70: Cases. Franklin Lodge.

A special verdict will not supply an omitted allegation. Goodwin, 158 Ind. 202; Shutte: 291 (allegations essential to admit evidence).

12a. MALLINCKRODT CHEMICAL WORKS v. NEMNICH (1902), 169 Mo. 388-399 (case in equity).

Error in sustaining a general demurrer saves itself. It need not be objected nor excepted to. Such error is available from the mandatory record; the statutory record is useless in such a case. See Roden; Missouri; Chitty; Andrews v. Lynch, 27 Mo. 167. The *coram non judice* proceeding need not be excepted to. Harkness: 152: Cases.

Legal conclusions are surplusage and void ab initio. They are not a matter for aider; they cannot be aided by a denial, nor by pleading over. *"The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted to the complaint containing it."* Loc. cit. 397, Institute v. Bitter, 87 N. Y. 250, S. P.; U. S. v. Cruikshank; 205 U. S. 257.

A pleader pleads at his peril, he cannot cast the *onus* upon his adversary, to move to make more certain or definite, or to demur, if any matter of substance is omitted. *Verba fortius,* etc.; Dovaston: 217; Clark v. Dillon, 97, N. Y. 370. Facts not legal conclusions must be pleaded. Hanford: 86; Green: 90.

Reasons for certainty; the test for. S. 4 Hughes' Proc. C. v. Robey, Guedell: 74, 74*a*; Dovaston: 217.

Limitation of liberal construction. Dobson: 232*a*; Munchow, 96 Mo. Ap. 553. Omission of material allegation fatal. Robinson, 105 Mo. 567; 102 Mo. Ap. 458; Weil, 69 Mo. 281; Andrews v. Lynch (1858), 27 Mo. 167 (the code establishes no new rule).

A motion in arrest is to be considered as a demurrer. 1 Chit. Pl. 716. Reasons for this are discoverable in Mallinckrodt: 12*a*. Defects of substance can not be waived. Codes reaffirm this rule again and again. Sto. Pl. 10. Discussions relating to this are confused. See Rushton: 5: Cases.

12b. RODEN v. HELM (1905), 192 Mo. 71.

Errors in the mandatory record ("record proper") a court sua sponte takes notice of regardless of objections and exceptions. Campbell v. Porter. *Allegata et probata* must correspond. *Frustra probatur quod probatum non relevat.* 192 Mo. 71.

A reply and issue can be waived. Pp. 83-85: Cases. *Certum est quod,* etc., cited and applied.

Admissions in pleadings may be contradicted it seems. Cass, 188 Mo. 1. See Bradbury: 35.

Construction of pleadings; liberal rule ap-

Leading Cases.—12b. Roden.

plied. Brewing Co., 187 Mo. 367; Rogers, 186 Mo. 248 (general demurrer may be waived). See Missouri.

The trite and familiar rules are often quoted in Missouri but they are not reasoned from, and consistently applied to, and from, and for the conserving principles. Many decisions are equivocal and uncertain, *e. g.*, it is inconsistent to say that the court will *sua sponte* notice error on the mandatory record and at the same time hold that the general demurrer can be waived; also that the motion in arrest can be waived and that it must appear in the statutory record. 199 Mo. 159; Mallinckrodt.

12c. FISH v. CLELAND (1864), 33 Ill. 237-245. Huffc. & W. Cas. Conts., 288; Waugh v. Robbins, *id.* 182; Bush v. Connelly, *id.* 447; Lang v. Metzger, 206 Ill. 475, 488.

Cited, §§ 11, 201, Gr. & Rud.

Allegata et probata must correspond. The latter cannot be considered without the former. Evidence without allegations is surplusage; the latter cannot be supplied from the evidence. "And you must prove the charge as laid" is from the civil law. These words met the approbation of Paul when Festus spoke them in his behalf. *Frustra probatur quod probatum non relevat.*

A court is bound by its record. It cannot rest judgment upon matter that arises from evidence only. Israel v. Reynolds (Ill.); Farrar v. Davenport (Ill.); Waugh; Bush; Sto. Pl. 10.

Pleadings are the juridical means by which a court is invested with jurisdiction of a subject-matter to adjudicate it. Montana; Brown v. City; Fish; Smith v. Burrus (Mo.); Chitty v. R. R. (Mo.). See ALLEGATIONS. *Contra,* Weems (Texas).

Cf. Franklin Union No. 4 v. P., 220 Ill. 355, 77 N. E. 176, 110 Am. St. 248-274; O'Brien v. P., 216 Ill. 354, 108 Am. St. 219.

A court without its record is without jurisdiction. Usurpation vitiates. See DICTUM; Horan v. Wahrenberger; Munday: 79: Cases.

Variance can be waived. Dorn v. Farr.

12d. PEOPLE'S BANK v. CALHOUN (1880), 102 U. S. 256.

A matter not juridically presented cannot be judicially considered, e. g., a cause cannot be removed from a state to a federal court by stipulation which does not show the jurisdictional facts relating to the subject-matter and the citizenship or character of the parties. 102 U. S. 261. Campbell v. Porter: 2.

Consent will not confer jurisdiction of a subject-matter. 102 U. S. 256, 260-261. Thomas v. Board.

13. BEARDSLEY v. DOLGE (1894), 143 N. Y. 160, 38 N. E. 453, 42 Am. St. 707, n.

Jurisdiction of subject-matter can not be waived. Campbell; Springer.

Consent will not confer jurisdiction of subject-matter. If there is want of authority

Leading Cases.—13. Beardsley.

to determine the subject-matter of the controversy, an adjudication upon the merits is a nullity and does not even estop the assenting party. One can not lawfully consent to a thing forbidden by public policy. Sto. Pl. 10; Hughes' Conts. 11-18. See JURISDICTION. One cannot agree that he is a delict, when he is not. *Fabula;* JURISDICTION.

A matter must be adjudicated at the right forum to meet requirements of the conserving principles of procedure. See JURISDICTION.

14. VAN LEUVEN v. LYKE (1848), 1 N. Y. 515, 49 Am. Dec. 346, 1 Thomp. Neg. 188.

Negligence; animals; liability of owner for. May; Loomis; *Sic utere.*

Cited, § 30, Hughes' Proc.; §§ 237, 278, Gr. & Rud.

Omitted allegations. Cruikshank, L. C. 232. Cannot be supplied from other parts of the record, *e. g.,* the findings. Hitchcock. 2 Cyc. 689, 691; 9 Id. 728. See AIDER.

Omitted allegation is fatal. Declaration for mischief done by an animal of a domestic nature, which does not allege either that the animal trespassed upon plaintiff's lands, or that the defendant knew of its vicious propensity, is bad. And this objection is not waived; it may be raised at any time. It may be raised for the first time upon appeal. Campbell; Rushton; Cruikshank. Walker v. Turner; Russell v. Shurtleff; Thomas v. Mackey; R. v. Waters. See WAIVER.

15. THOMAS v. MACKEY (1877), 3 Colo. 391 (under common law). S. P. as Rushton, Bristow and Shutte, Sto. Pl. 10, 26, 27, 28, 257, 259; Beach Eq. Prac. 99.

Cited, § 30, Hughes' Proc.; § 237, Gr. & Rud.

This case is much opposed to other cases by the same court. We may gather from Colorado cases that the mandatory record is a bulwark of protection on the one hand, or that its uses are to enable courts to construe it into a climax of absurdities on the other.

Thomas is surpassed in strictness by Robinson. Cf. Jansen, 8 Colo. App. 38, 40; Woodside, id. 514; Colo. Co., 8 Colo. App. 541; Fairbanks, id. 190, 193 (allegations aided and supplied from proof); Holman, id. 284, 285 (pleadings waived—departures upheld—mandatory record substituted by matter *aliunde*).

Parties cannot contract—stipulate in writing—for matter that should appear in the mandatory record. Tucker, 7 Colo. 62, 68. What they cannot do expressly—directly—formally—they may nevertheless do by waiver, if formally signified. Hume.

Nothing can be consented to that is *coram non judice.* Filley, 4 Colo. 109; Kirtley, 4 Colo. 111. S. P., Blair: 170. (Proceedings in vacation void.) A record must be sufficient for *res adjudicata* purposes. Moynahan v. P. *Contra:* Haley v. Elliot, 20 Colo. 383-384.

Consent cannot supply *allegata.* Thomas;

Leading Cases.—15. Thomas.

Deitsch; Fulton Co., 6 Colo. App. 554. (Allegations and issues essential.)

But a plea of *res adjudicata* may appear from irrelevant argument in the supreme court, and from cases it had just decided, when from the opinions in these it is clear there was no matter before the court from which *res adjudicata* could arise, and also that fundamental requirements had been disregarded—that the court refused to open the record (Clyde Mattox v. U. S.) and that there was no *coram judice* proceedings that would or could support a claim of *res adjudicata* or "due process of law." Haley, 20 Colo. 383, 384. See Hume; Breeze; Rensberger. Russell v. Shurtleff (Colo.). Hughes' Proc.

"The judgment cannot be sustained because it was not warranted by the pleading." Jansen; Gallup, 11 id. 308; Tucker, 7 Colo. 68; Legere, 17 Colo. App. 472 (no exception necessary to entry of judgment on a verdict).

16. ROBINSON MINING CO. v. JOHNSON (1889), 13 Colo. 358, 361, 362. (Under code.)

Cited, § 30, Hughes' Proc.; § 237, Gr. & Rud.

An allegation that a buyer contracted for charcoal does not include the fact that he agreed to accept and pay for it. Here the greater did not contain the less. See Spieres, *sub,* Rushton; Dobson.

Allegations must exist, they cannot be waived. Omission of may be raised on appeal, and there for the first time. Thomas, 14 Colo. 254 (right rule).

Robinson was immediately denied. The same judge denounced its rule in Johnson v. Bailey, 13 Colo. 59. See Hume: Cases.

Colorado cases are sometimes surpassingly strict, and very repugnant to liberal views. Hume: cases. To illustrate. In an indictment for murder the name of the murdered man, Fitzpatrick, appeared eight times. In two places it was spelled "Fitz Patrick." After verdict, this was held a fatal variance. Moynahan. "Michael J." is not "Mike J." Sullivan v. P. (1889), 6 Colo. App. 458; Sault v. P. (1893), 3 Colo. App. 502. *Contra:* Pitsnogle v. C. (Va.); Marr v. Wetzel (1876), 3 Colo. 2 (correct rule of *idem sonans*).

One is entitled to a certain record for res adjudicata purposes. 3 Colo. 373. See 2 Colo. 88; Hume: cases. If the improper use of an upper case "P" for a lower case "p" would destroy a plea of *res adjudicata,* then we are enabled to see how strict its rules are. Truly, pleading must exist, and can not be waived.

Jurisdictional facts must appear with certainty. P. v. Brown: 127; *Contra:* cases; Liss, 2 Colo. 88. Omitted allegations are fatal and can not be supplied by aider. Robinson; P. v. District Court. A court acquires jurisdiction of a subject-matter from its pleadings. The statement of claim must be definite and certain to authorize the court to proceed. Without such statement prohibition will issue and arrest the proceedings. P. v. District Court (1899), 26 Colo. 386 (injunction of district court to restrain gambling prohibited by supreme court). See JURISDICTION.

Leading Cases.—16. Robinson.

17. VAN CLEAF v. BURNS (1890), 118 N. Y. 549, Tiedeman, Cas. Real. Prop. 63. *Estoppel of record; res adjudicata must be pleaded.*

"Neither the nature nor the effect of the judgment of divorce granted by the court of Illinois, in favor of David Van Cleaf against the plaintiff, appears in the record before us, except that the bond of marriage between them is stated to have been dissolved upon the ground that she had wilfully deserted and absented herself from her husband without reasonable cause for the space of more than two years prior to the commencement of the action." 118 N. Y. 553. "We cannot presume it was more than a temporary or conditional divorce from such a pleading."

See Stokes *sub,* Wright v. Griffey: 28. *Verba fortius,* etc.; Sto. Pl. 665; 190 U. S. 546. *Res adjudicata* must be pleaded. See Id.: Wright. Conclusions of law are surplusage and need not be pleaded; they are void and are not aided. See SURPLUSAGE. Foreign statutes must be pleaded, and, if denied, proved. 118 N. Y. 553, Whart. Ev. 288, 300. Answers must be pleaded with certainty like complaints. J'Anson; Pom. Code, 546, 597-600. *Ambiguum.*

18. FLETCHER v. TREWALLA (1883), 60 Miss. 963. *Cited,* §§ 185, 314, Hughes' Proc.; § 296, Gr. & Rud. Assessments must be aptly made; assessor may take advantage of his own assessment, if not made in time. Fletcher; Cool. Tax.; Campbell v. Springer; Beardsley. An assessment, if void as to one, is for all. There are limitations of waiver—estoppel—in all judicial and *quasi*-judicial proceedings. Consent cannot confer jurisdiction of subject-matter. See *Consensus.* § 314, Hughes' Proc. *Allegans,* etc.

An affidavit is jurisdictional in replevin, but a plaintiff cannot object to its omission. Cobbey, Replev. 528 (only a defendant can object to).

19. R. v. WHEATLEY (1761), (Mansfield), 2 Burr. 1125, 1 Wm. Bl. 273, 3 Crim. Def. 100, n., 1 Lead. Crim. Cas. (B. & H.) 1-34 n.; Beale, Crim. Cas. 1, Clark, Crim. Cas. 3, Bish. C. L., Cool. Torts, 95, 3 Gr. Ev. 1, 2, 13, 24, 1 Bish. Crim. Proc. 326; stated and followed, Wright v. P. (1825). Breese (Ill.), 102; also in many other states. See tables of citations.

Cited, §§ 22, 23, 26, 90, 100, Hughes' Conts.; Hughes' Proc.

Cited, §§ 11, 24, 118, 119, 122, 143, 152, 159, 163, 192, 202, 203, 222, 225, 232, 237, 278, 289*a*, 292, 294, Gr. & Rud.

Wheatley stated: Wheatley was a brewer and sold what he called eighteen-gallon kegs of beer. One Webb bought these kegs upon that supposition, with the kegs plainly before him and open to measurement. But he did not measure them

Leading Cases.—19. Wheatley.

until after their delivery and payment therefor. Then he found they did not contain eighteen gallons, as represented, but only sixteen gallons. He complained, and Wheatley was indicted and convicted. The prosecutor and prosecuting attorney, the grand jury, petit jury, court—all thought Wheatley was guilty—that he had committed a crime. But on appeal he was cleared and vindicated, upon the ground that Webb bought upon inspection, with his eyes open; or, in other words, be bought *Caveat emptor*. Gordon v. Parmele (Mass.) Sub *Caveat*.

The Wheatley Case may justly be regarded as one of the greatest, for it was decided by Mansfield, the lawyer of the ages; and besides, it profoundly permeates government, as it fixes its limitations and the conditions under which it may prosecute for crime, or, in a wider sense, the essential conditions upon which jurisdiction may be employed and proceeded with for certainty and a definite theory. It involves principles that safeguard tremendous interests. It is a case that illustrates how the technicalities of the law are its safeguards as already observed. Windsor: 1. It is not alone a dominant case upon procedure, but it is equally so upon tort and contract. It is a case that fixes boundaries for many leading subjects, and particularly procedure, contracts, crimes and torts. Of course all such cases profoundly involve construction. *Concordare leges legibus est optimus interpretandi modus*. P. v. Turner.

It seems proper to call attention to a dissensus of authors as to the most appropriate case or topic to present the principles in *Wheatley*, and therefore to the fact that:—

One eminent author and professor excludes *Chandelor* and to elucidate its principle selects *Pasley*, while another selects *Chandelor* and excludes *Pasley;* and still others elucidate the principle under *R. v. Wheatley* (Bennett & Heard's Lead. Crim. Cas.), while others choose *Caveat emptor* and its cognate maxims. Others have developed those old roots and the trunk of the subject under "late" and "modern cases" and "American cases," until volumes upon the little conception of *Caveat emptor* in *Wheatley* amount to scores of annotated cases, great encyclopedias and digests. And after all, the elucidation of *Caveat emptor* teaches it briefly, yet clearly and impressively, but as the seed is to the plant. Of cases, *Chandelor* broadly introduces it, and so Mr. J. W. Smith thought; and another eminent writer and professor singularly chose that case to exploit the principle, and omitted all mention of its modifications, and of course *Pasley*. Still further are given "the modern law of contracts," in the preface of which we are informed a decided preference will be given the well-considered cases of recent years. Above and beyond this view, however, such cases as *Chandelor* and *Pasley* are cited, thereby adding much to the value of the work referred to, exactly as such citation improves all works.

Another recent work informs us that its citation will be singular, and that it will cite both the "leading" and "ruling" cases. Looking from Smith's Leading Cases, and the English Ruling Cases, the distinctions between those supposed classifications are not clear, for the same cases are found in each of those works, and, therefore, here it is a "leading case" and yonder it is a "ruling case." Research must go deeper than labels to avoid confusion.

Elsewhere are unfolded various elucidations of the contract principle in *Wheatley*. *See Caveat emptor; Chandelor; Pasley:* 374, 375.

The foregoing views will remind the reader of what is elsewhere observed of *Qui primum peccat ille facit rixam*, which is not only the burden of the *Squib Case*, but of all the cognate cases there mentioned. Still we are taught that cases introduce new rules or principles and that the "late," the "modern" and the "American case" constitutes the best matter for instruction. Indeed, one learned writer and professor writes that the *"Squib Case"* also *has had its day*, while others are busy reprinting it and representing it for its great and world-wide worth, and as an equal in value and importance to *R. v. Wheatley* or Keech v. Sandford. See illustration of the river under EQUITY, Gr. & Rud.

Whatever error exists in writing and teaching the law can be judged from such contentions and conflicting views as last mentioned. Beyond these are other conflicts to be considered. See *De non apparentibus*, etc. THEORY OF THE CASE; Hume; LITERATURE.

Starting with *Caveat emptor*, and noting the *Chandelor*, the *Pasley* and the *Laidlaw Cases*, enough can be gathered in a few minutes to understand the views of any one familiar with either the maxim or any of those cases. Cases merely illustrate the application of a maxim. On the higher and broader field there is no room for confusion.

Wheatley may be cited to the point that a crime must be charged in an indictment. C. v. Child (1832), 13 Pick. (Mass.) 198, Shaw, J.; C. v. Hunt (1842), 4 Met. (Mass.) 111, 38 Am. Dec. 346; Huntsman v. S.: 231. And such is Bartlett and Rushton. Mansfield held the same in the latter case, and in 1820 Kent quoted nearly all of *Rushton* and followed it in *Bartlett* and then Shaw, *supra*. Story, Pl. 10, and in other sections, and codes reaffirm this rule, which is elsewhere noted. The charge in some certain form is essential. Hurtado; U. S. v. Pettibone, *sub*, CONSPIRACY; Cruikshank. To charge fornication it must be averred that each party was unmarried. Bennett v. S.

Leading Cases.—19. Wheatley.

(1897), 103 Ga. 66, 68 Am. St. 77, n. A crime must be shown within the statutory period to confer jurisdiction upon a justice to protect him. Vaugh v. Congdon (1885), 56 Vt. 111, 58 Am. Rep. 758, 761, Cool. Torts, 200, Throop, Pub. Off.

Jurisdictional facts must affirmatively appear. They are not presumed nor inferred nor supplied by intendment nor liberal construction. Huntsman: cases; Cruikshank; Bowman v. P. (a very instructive case). *Debile fundamentum fallit opus.* Bro. Max. 180, 181, 715.

Habeas corpus will release one imprisoned for playing baseball, where that is no crime. 80 Am. St. 638, *sub, Ejusdem generis.*

Pleadings cannot be waived. Windsor; Garland; Hurtado; Munday; Campbell; notes, Lampleigh. Every presumption against a pleader. And this rule never changes. Dovaston; Moore v. C. Same point in Lipschitz v. P. (1898), 25 Colo. 261 (guilt overwhelmingly clear, but indictment fatally bad); and this rationale was applied in Robinson. Hume; Whitesides v. P. (1819), Breese (Ill.), 21 (conclusions of law will not do); Acts of the Apostles, 22-26; Green: 90.

Plea of guilty only admits facts well pleaded. Grossman, 30 Or. 478, 60 Am. St. 832, n.

A crime must be charged, that the post litigation, the appellate procedure, the former jeopardy, res adjudicata uses of the record may not fail. 1 Gr. Ev. 63, 2 *id.* 7, 3 *id.* 10, Wheatley; R. v. Vaux, L. C. 69. 1 Bish. Crim. Proc. 2, 4, 19, 77, 88, 319, 321, 331, 498, 505, 544, 1285, 1291; C. v. Hunt; Moore v. C.; Huntsman v. S. (instructive case); Cruikshank.

An indictment must charge a crime, or the court acquires no jurisdiction upon which it can proceed and take evidence. Wheatley; Moore v. C.; R. v. Goldsmith; Windsor; Munday; 1 Bish. Crim. Proc. 326, 418, 505, 544, 1285, 1291. See JURISDICTION; *Quod ab initio*, etc. An authority must appear. A court's record is the charter of its authority; a court is bound by it, as is the attorney in fact by his power of attorney. §§ 7-12, Hughes' Proc. These rules arise from the conserving principles of procedure. See IDENTIFICATION. They apply to all cases alike, whether civil or equitable. Criminal cases are not alone technical.

Consent cannot confer jurisdiction of subject-matter. 1 Bish. Crim. Proc. 96; Sto. Pl. 10; Bro. Max. 180, 182, 601, 715. See JURISDICTION. *De non apparentibus*, a maxim of the civil law. Acts of the Apostles, chaps. 23, 26. Codes reaffirm the above, and also provide that filing an answer will not waive the omission of material facts. These can be waived under no system. Wheatley; Rushton.

A motion in arrest of judgment is not waived by a plea of guilty; for consent cannot confer jurisdiction. A motion in arrest will lie to a defective indictment. Wheatley; Cruikshank; 1 Bish. Crim. Proc. 1287-1293.

Leading Cases.—19. Wheatley.

Issues are essential to authorize a trial. Munday; Crain.

One may make a fool of another if he can. J., without false tokens, pretended he was B.'s agent, when he was not. Upon the belief that he was such agent he got £20. This was held not indictable. R. v. Jones (1704), 1 Salk. 379.

Public and private wrongs. What are indictable cheats, swindles, frauds, tricks and pretenses. Wheatley, 1 Lead. Crim. Cas. (B. & H.) 1-34; P. v. Johnson.

20. R. v. GOLDSMITH (1875), L. R. 2 C. C. R. 74, 12 Cox, C. C. 479; stated, 8 Rul. Cas. 115; cited, 2 Bish. C. L. 1137.

Cited, § 106, Hughes' Proc.; § 56, Gr. & Rud.

Goldsmith stated: False pretenses pleadings; aider by verdict. Indictment for receiving stolen goods by means of false pretenses, which failed to set out the means. On motion in arrest of judgment, this omission was *held* cured by the verdict; Dobson, 232*a*.

Limitations of liberal construction: Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict by the common law. Bro. Max. 181, 602; 1 Gr. Ev. 19. See U. S. v. Mills. Such defect, if any, is cured by verdict. R. v. Waters; R. v. Waverton: 70, 71; Rushton; Bowman v. P.

Pleadings essential. 2 Gr. Ev. 7; 3 *id.* 10; 1-83.

Allegations; aider by verdict. Same rule applies in both civil and criminal cases. Notes on Saunders by Williams, p. 261; R. v. Aspinall (1876), 2 Q. B. D. 48, 13 Cox, C. C. 563; cited, 2 Bish. C. L. 191; R. v. Strouiger (1886), 16 Cox, C. C. 85: cases. Bristow: 135; Wheatley; Munday; 8 Rul. Cas. 107-149, n. *De non apparentibus.* Dobson: 232*a*.

21. MOORE v. C. (1843), 6 Met. (Mass.) 243, 39 Am. Dec. 724, 2 Lead. Crim. Cas. (B. & H.) 284.

Cited, §§ 6, 19, 27, 28, 29, 30, 52, 62, 72, 78, 80, 82, 90, 97, 105, 106, 153, 176, 186, 190, 191, 215.

Cited, §§ 113, 119, 143, 159, 202, 203, 223, 237, 278, 294, 312, Gr. & Rud., Hughes' Proc.

Moore stated: Alleging that Moore did commit the crime of adultery, with Mary Stuart, she being a married woman, and having a husband alive, charges no crime. Every presumption is against a pleader, and Mary Stuart may have been Mrs. Moore, Moore's own wife. The wife may have her own distinctive name; it may not be Moore. Therefore the pleading is uncertain.

A crime must be described. Moore; Huntsman (most instructive cases); Cruikshank,

Leading Cases.—21. Moore.

L. C. 232; Wheatley; Sault v. P. (1893), 3 Colo. Ap. 502; Lipschitz v. P., *sub*, Wheatley; s. p., Rushton; R. v. Goldsmith; R. v. Waters; R. v. Waverton; R. v. Vaux; L. C. 69-71; C. v. Eastman; C. v. Bean.

Every presumption against a pleader. Moore; Dovaston; *Verba fortius*, etc.; Walker v. Turner; 118, Cruikshank; Harvey v. Brydges; McCarty v. Hotel Co. (1898), 144 Mo. 397, 402 (Code—Instructive Case).

Analogously a bill of exceptions must affirmatively state that all the evidence is incorporated therein. Bates; Richardson v. St. Joseph Co. (important appellate procedure rule).

From the return of the indictment into court thereafter for all time, in every court, the question of whether or not a crime is charged is always raised. An *amicus curiæ* may suggest it, and the court is presumed to have looked, taken notice, inquired and considered. Bloom; Campbell v. P.; notes to Lampleigh.

Legislatures cannot abolish certainty. C. v. Eastman: cases; Brown v. P. (1874), 29 Mich. 232; Dovaston; Huntsman. *Verba fortius*, is a first principle of the unwritten constitution. It can not be reversed in a constitutionalism. Every presumption against the accused is the rule of the barbarous and inquisitorial. 64 Cent. L. J.: 169-174.

Alternative pleadings are void. Pain; Dovaston. See REPUGNANCY.

22. C. v. EASTMAN (1848), 1 Cush. (Mass.), 189, 48 Am. Dec. 596-610, n., 1 Lead. Crim. Cas. (B. & H.) 1st ed.; cited, 1 Bish. C. L. 432, 536, 592, 1041, 2 *id.* 178, 193, 201, 202, 206, 214, 3 Gr. Ev. 15, 89, 90, 2 Bish. Cr. Proc. 213. See Cruikshank: 232.

Conspiracy; pleadings. Facts and circumstances must be pleaded as in fraud. Eastman; J'Anson; *Ex dolo malo;* Russell v. Mann; Williams v. Hingham.

Elements of the offense. Pettibone v. U. S. (1892), 148 U. S. 197; 1 Bish. C. L. 592, 2 *id.* 169, 240*a;* Hutchins v. Hutchins; 3 Gr. Ev. 89-99; 2 Bish. Cr. Proc. 202-245. See CONSPIRACY. Conspiracy to defame one is indictable. 1 Bish. C. L. 591.

Facts, not conclusions, must be pleaded. Certum est quod, etc.; Green; J'Anson. See CONCLUSIONS.

Homicide; means must be set out; also in forgery. U. S. v. Watkins, *sub*, R. v. Bryan; C. v. Holmes (1892), 157 Mass. 233, 34 Am. St. 270, n.; Schaffer v. S., 22 Neb. 557, 3 Am. St. 274, n.; Moore v. C. Equitable exceptions to Statute of Frauds; facts must be pleaded. Lyon; Lester. These are the most refined and technical of cases. Fraud; same rule. *Ex dolo malo*, etc. Answers in defamation. J'Anson.

Adultery must be particularly and circumstantially alleged in divorce proceedings; all facts must appear with certainty. Marsh; 16 N. J. Eq. 391, 84 Am. Dec. 164-168, n.: cases.

Leading Cases.—22. Eastman.

Legislature cannot abolish certainty in indictment. Huntsman; Cruikshank; Cool. Const. Lim. 327; Brown v. P., 29 Mich. 232; Bristow; Moore: 231, 232, 135, 21.

Generally: Green: 90 (Code). *Omne majus.* See CERTAINTY.

23. S. v. THURSTIN (1853), 35 Me. 205, 58 Am. Dec. 694-697, n.

Cited, §§ 29, 153, 186, 190, 191, Hughes' Proc.; § 223, Gr. & Rud.

Due process of law; essential allegations. A crime must be charged upon the record before there can be a conviction. Thurstin; Moore v. C.; U. S. v. Perez; Williams v. Hingham.

Material facts and circumstances embraced in the definition of an offense must be stated; these cannot be supplied by intendment or implication. Pettibone v. U. S.: Conspiracy; Cruikshank; Moore v. C.; 2 Gr. Ev., § 7, 3 *id.* § 10. *De non apparentibus*, etc.

Jurisdictional facts must be alleged upon the record, and with certainty. Campbell v. Porter; Wheatley; Moore v. C.; Russell v. Mann; Munday; U. S. v. Perez; R. v. Vandercomb; Bristow.

24. SPRINGER v. SHAVENDER (1896), 118 N. C. 33, 23 S. E. 976, 54 Am. St. 708, n., 33 L. R. A. 772, End. Stat. 447: Kleber on Void Judicial and Execution Sales. See Scott v. McNeal.

A court must have jurisdiction of person and subject-matter. See CORAM JUDICE; Windsor; Starbuck; Campbell v. Porter; Garland v. Davis; Scott v. McNeal, overruling 5 Wash. 309, 34 Am. St. 863 (a court cannot administer upon and sell a living man's estate. Decree of probate void, if made without jurisdiction); Smith v. Wildman (1896), 178 Pa. 245, 56 Am. St. 760, n., Van Fleet, Coll. Att., Brown, Jurisdic. 123-146: Carr v. Brown (1897), 20 R. I. 215, 78 Am. St. 855: cases; *Fabula non judicium:* Taylor: 219*a*.

Fundamental facts are essential to support a sale. Douglas v. Whiting; Ransom: 122; Clem. See COLLATERAL ATTACK.

Statutes cannot authorize an administration upon the estate of a living man. Sub, Taylor. There is no wronged man before the court. But see 5 Wash. 309, 34 Am. St. 863: cases; Springer; Cummins v. Reading (1903), 206 Pa. 469, 98 Am. St. 790.

A cause of action must exist in fact. Fabula non judicium. Weltmer. And it must appear from the right record, 2. Planing Mill Co. v. Chicago; People's Bank v. Calhoun.

25. OUTRAM v. MOREWOOD (1803), 3 East, 346, 7 R. R. 473, 5 Mor. Min. Rep. 484; Thayer, Cas. Ev. 556; Cromwell. S. P. in Strutt v. Bovingdon (1803), 5 Esp. 58, 8 R. R. 834; 6 Mews' E. C. L. 366, 564. Cited, p. 9; §§ 4, 22, 26, 29, 37, 120-145, 242, Hughes' Proc.

Cited, §§ 91, 171, 173, 182, 193, 223, 270*a*, Gr. & Rud.

Issue decided in former case is res adjudicata. Outram; Cromwell; Markley v. P. (1898), 171 Ill. 260, 63 Am. St. 234; Sto. Pl. 791; Mondel L. C. 77; New Orleans,

Leading Cases.—25. Outram.

167 U. S. 371, 397 (42 L. ed. 202: cases, stating Cromwell); So. Pac. R. R. v. U. S. 1897), 168 U. S. 1-66 (42 L. ed. 355, 377: cases, ext. n.). S. P. Smith v. Sherwood (1822), 4 Conn. 276, 10 Am. Dec. 143; stated, 32 L. R. A. 248; 2 Sm. L. C. 771, 7th ed.; Gray v. Dougherty (1864), 25 Cal. 266; Gardner v. Buckbee (1824), 3 Cow. 120, 15 Am. Dec. 256; stated, Cromwell (effect of litigation about one upon successive notes all of the same issue): Nickum v. Burckhardt (1897), 30 Or. 464, 60 Am. St. 822 (estoppels must be pleaded).

Ambiguous plea insufficient for res adjudicata. Lea: 30. See Dovaston; S. v. Thurston; C. v. Roby; Draper; Brock v. Royall, 211 Ill. 290, 103 Am. St. 200; Howe's Civil Law, 67.

26. CROMWELL v. COUNTY OF SAC (1876), 94 U. S. 351-371, 24 L. ed. 195, 16 Am. Law Reg. (N. S.) 721-734, n.; Rood, Garn. 126: stated, 124 U. S. 231, 167 U. S. 397, 42 L. ed. 211, 168 U. S. 49 (42 L. ed. 377); 69 L. A. R. 481; 205 U. S. 131.

Cited, p. 13; §§ 4, 22, 26, 29, 120, 122, 124, 129, 130, 135, 137, 138, 145, 176, 242, 300, 348, Hughes' Proc.

Cited, §§ 91, 100, 171, 173, 182, 192, 198, 223, 278, Gr. & Rud.

S. P. in Outram (a fact decided in one case may be pleaded as *res adjudicata* in another); 68 Conn. 63, 57 Am. St. 88; 13 Wash. 147, 52 Am. St. 29; Gardner; So. Pac. R. R.; Mitchell, 180 U. S. 471; Freeman, 131 Cal. 386, 82 Am. St. 355.

A judgment is only evidence of a right, and not of any fact. The fact or facts upon which a judgment rests depends upon former allegations and their denials, and of their disposition; and as to these they are always open to inquiry. Neither judgment nor opinions can foreclose this inquiry. Cohens; Horan. Whether or not there was a cause of action stated or really existing, is forever an open question; for upon such facts depends jurisdiction of subject-matter. *Fabula non judicium.*

A pleading must disclose a subject-matter with certainty to subserve the wants of res adjudicata. Russell v. Place.

Certainty is well taught from the Cromwell, Davis and Russell cases, all in 94 U. S., and all decided by Field.

Cromwell is cited with approval in Hanrick, 93 Tex. 461, 479, 480 (a general plea of *res adjudicata* was held sufficient). 69 L. R. A. 481.

Res adjudicata; important rule. All that could or might have been decided is presumed to have been. Garden City, 65 Kan. 345; 93 Am. St. 284; Bissell: 42; Hahl; Perez.

Defences not pleaded are waived. 105 Mo. Ap. 248; *Omne majus continet in se minus.* In Colorado their conduct is looked to. Clark v. Knox, 32 Colo. 243-355; Gila, 205 U. S. 279. See Rensberger: Hughes' Proc.

27. RUSSELL v. PLACE (1876), 94 U. S. 606 (24 L. ed. 214), 21 Fed. Cas. 57, 9 Blatch. 173, 5 Fish. Pat. Cases, 134, 1

Leading Cases.—27. Russell.

Fost. Fed. Proc. 132 (estoppel must be certain).

Cited, §§ 124, 176, 331, Hughes' Proc.

A pleading must disclose with certainty a subject-matter in order to serve the uses of res adjudicata. Cromwell; Outram; 180 U. S. 33, 471, 533; Rushton; Draper v. Medlock, stating Russell; also De Sollar v. Hanscombe, 158 U. S. 221 (estoppels are odious). *Verba fortius.*

Leading rules of *res adjudicata* are also rules of pleading. See Pain: 107.

In civil cases the argument of courts and most all text writers is for pleadings to notify a defendant of what he must meet at the trial; the further use to inform the court is sometimes added. Upon these grounds we are instructed that pleadings are required. After fully admitting those requirements, still it must be confessed that the presentation is entirely too narrow and frail. From it great errorists have written and taught that pleadings can be waived. That little, narrow and partitioned view has led active, logical minds as far astray as the law is vast and intricate. See IDENTIFICATION.

In criminal cases another ground is sometimes added, namely, the use of the record to sustain a plea of *res adjudicata.* 3 Colo. 382; Huntsman; Cruikshank. See Pain: 107; C. v. Robey: 74.

Remitter of damages permitted in appellate court, to avoid a new trial. 21 Fed. Cas. 51.

28. WRIGHT v. GRIFFEY (1893), 147 Ill. 496, 37 Am. St. 228, 2 Van Fleet, For. Adj. 176, n.

Cited, §§ 22, 26, 29, 120, 129, Hughes' Proc. § 59, 223, Gr. & Rud.

Res adjudicata pleas depend upon matter appearing from the mandatory record, which must be pleaded and proved. Sto. Pl. 791; Slater v. Skirving (1897), 51 Neb. 108, 66 Am. St. 444, n. (pleadings and judgment introduced); Stokes, 155 N. Y. 581, 592, 1 Am. Prac. Rep. 1, 23 (point decided must be material and be in issue and litigated. Kingston Case affirmed); Van Cleaf.

Essentials of a plea of res adjudicata. See id., 1 Gr. Ev. 63, 528-532; 1 Whart. Ev. 781, 782; Sto. Pl. 791; 9 Encyc. Pl. & Pr. 611-640; Markley v. P. (1898), 171 Ill. 260, 63 Am. St. 234.

Must be pleaded if there was an opportunity to plead it. Water Com. v. Cramer (1897), 61 N. J. Law, 270, 68 Am. St. 705; Stokes (record admitted without pleading it). Black, Judg. 784; 1 Freem. Judg. 284; 1 Gr. Ev. 528-533; So. Pac. R. R. v. U. S., 168 U. S. 1-63, 1 Am. Prac. Rep. 329-390, n. (judgment if admissible is conclusive without pleading it); n. 27 Am. St. 344-349.

All estoppels must be pleaded. S. v. East Fifth R. R. (1897), 140 Mo. 539, 62 Am. St. 742; Borkenhaagen; Wisconsin Co. (estoppel *in pais*—equitable estoppel); Tyler v. Hall (1891), 106 Mo. 313, 27 Am. St. 337-349, ext. n. (code requires pleading of); DeVotie, 15 Colo. 467, 22 Am. St 426 (equitable estoppel must be pleaded);

Leading Cases.—28. Wright.

Webb v. J. Hancock Co. See 2 Best, Ev. 543. Nickum v. Burckhardt (1897), 30 Oreg. 464, 60 Am. St. 822, n.; Young v. Raincock (estoppel by deed); 2 Best, Ev. 542.

Estoppel by verdict requires strict pleadings. Cromwell and Outram cases. They are odious; all presumptions are against them. They must be pleaded like a plea in abatement. And. Steph. Pl., § 188; Tyl. ed. 316; 1 Gr. Ev. 22, n., 531, n.; Dovaston: 217. *Opinions of courts are not matter for res adjudicata.* Cohens and Outram cases.

The rule requiring a former adjudication to be pleaded should be studied from the conserving principles of procedure. The confusion arising from Kingston's Case relating to these should be comprehended.

A general plea was recognized. 124 U. S. 228; Hanrick, 93 Tex. 481 (material allegations waived by pleading over). See *Res adjudicata.*

Demurrer will raise issue where facts appear upon the record. Stone v. Cook (1904), 179 Mo. 534, 64 L. R. A. 287.

29. KEWAUNEE COUNTY v. DECKER (1872), 30 Wis. 624-637. S. P., Rushton v. Aspinall; Lea v. Lea; R. v. Wheatley; Bliss, Code Pl. 291, n. (3d ed.). Cited, pp. 29, 33, § 5, Hughes' Proc.; §§ 142, 202, 278, Gr. & Rud.

Codes require certain pleading. In codes.

Pleadings must be certain and free from ambiguity. Green; Gay, notes, C. v. Roby; J'Anson; Lea: 30; Rideout; Draper.

A definite theory is essential, and it must not be "fish, flesh or fowl." Kewaunee. See THEORY OF THE CASE; Starbuck; Dovaston.

Ambulatory pleadings not permissible. The code system recognizes no aider by pleading over, at least as far as concerns a complaint.

Waiver — consent — acquiescence — conduct—is in equity never a condonation of a fatally defective bill in equity. Sto. Pl. 10. And this view is in consonance with requirements of constructive notice (and registration of notice of deeds) where one is never required to look in unusual, odd and out-of-the-way places for a notice that must be of record, and in a proper record and at the right place, and made in the right way, at the right time to impart constructive notice. To all of its requirements *Expressio unius,* etc., is strictly applied. And so codes should be construed in their prescription for the mandatory record. According to that maxim the supreme court of the United States construes the requirement that the complaint must state a cause of action. It is not aided by an answer, nor a reply. See AIDER.

30. LEA v. LEA (1869), 99 Mass. 493, 96 Am. Dec. 772-799, ext. n., 2 Van Fleet, For. Adj. 295; Freem. Judg. 257. *Cited,* pp. 9, 10, 129, 176, 255, 259, Hughes' Proc.

Lea stated: Lea sued for a divorce for desertion; his wife pleaded in defense: 1st. His consent to separation. *Volenti,* etc.

Leading Cases.—30. Lea.

2d. That he was cruel. She established these pleas and defeated his divorce. Afterward, she sued for a divorce, and among other things sought to show that the separation was by consent. *Held,* insufficient, because uncertain upon which issue she succeeded in the former suit. Every record should be certain as to what is concluded. If possible a plea of *res adjudicata* is defeated, for estoppels are odious and all intendments are against them. Therefore what is concluded must affirmatively appear, free of ambiguity. Outram; Draper; Solly, 12 Colo. 30, 40: cases; stated, Van Fleet, For. Adj. 278; Russell v. Place; Hobbs v. Henning (1864), 17 C. B. (N. S.), 826 (112 E. C. L. R.); stated, 2 Smith, L. C. 807, 856, 832, 842, 851-853, 858, 8 Mews' E. C. L. 335, 13 id. 1210, 14 id. 1795; Johnson, 20 Colo. 143; Gordon, 3 Colo. Ap. 139: cases; Van Cleaf: 17.

Where a record presenting more than one ground of recovery or defense, and it is *uncertain* which was tried upon the *merits* and was *concluded,* there is no estoppel as to either. Cases, *supra;* Kleinschmidt, 14 Mont. 31, 43 Am. St. 604, 615 (general demurrer, with also special cause, it must appear that the cause was decided on the merits); Nashua R. R., 164 Mass. 222, 49 Am. St. 454, n.; Johnson, *supra.* These cases show that records are compared. See *Res Adjudicata.*

Evidence *aliunde* and oral evidence is admissible to prove what issue is involved. Embden, 89 Me. 578, 56 Am. St. 442, n. Limitations of this rule. Mondel: 77; Russell: cases.

Estoppels are odious and must be certain to every intent. Estoppels conclude the truth; they primarily rest upon *Allegans contraria non est audiendus*—contradiction—inconsistency—a species of fraud—and therefore they are strictly taken and clearly on principle, and also, upon the weight of authority, they must be strictly pleaded and proved, for they are not favored, but the contrary. The *rationale* may be gathered from the fact that a plea of former jeopardy is favored. Van Fleet, For. Adj. 661; yet a copy of the former indictment must be set out in the plea. 1 Bish. Crim. Proc. 814, 815; 11 Am. & Eng. Encyc. Law, 964; Allison, 13 Colo. 525, 16 Am. St. 224. Now, if a favored plea must be so pleaded, *a fortiori,* it must be pleaded in a civil cause. How to plead *res adjudicata* is in more conflict and discussion than is the rule in Shelly's case; one construction is, that in criminal cases it is favored, while in civil cases it is odious. But mark and remember the principle is the same; whoever pleads it must allege fraud or what is tantamount to fraud, and in all relations every intendment—presumption—is against fraud; it must be strictly alleged and proved. *Verba fortius,* etc. Therefore an adjudication must appear from a record with certainty. Munday: 79; Green: 90; Kewaunee; Robinson v. Raley: 45. Ambiguity in a

Leading Cases.—30. Lea.

record will destroy it, as a plea of *res adjudicata*. Lea, and cognate cases. *Pleadings must be certain to sustain the purposes of the conserving principles of procedure.* Pain: 107. See IDENTIFICATION.

Pleadings are always construed strictly. Notes, Lampleigh; Dovaston; 190 U. S. 546; Bristow: 135. *Verba fortius*, etc.

31. McLAUGHLIN v. KELLY (1863), 22 Cal. 211, 7 Mor. Min. Rep. 444.

Mandatory record must speak for itself and disclose all necessary matter to warrant all judicial action. Mondel; Gardner v. Buckbee; Cothran; Insurance Co.: 157; Iversile: 46. A remedy must follow allegations and proofs and be plenary. McLaughlin.

Probata will not supply allegata. Borkenhagen: 81; Shutte: 291. Nor verdicts, nor findings. Hitchcock: 12; Dobson.

Courts are bound by their records and must give judgment in accordance therewith. Austin R. R.; Cothran. It is well to observe that McLaughlin is a code case.

32. HARVEY v. RICHARDS (1814), 2 Gall. (U. S.) 216, 11 Fed. Cases No. 6,182. See *Res adjudicata* works.

Courts will afford remedies according to their records. Cohens; McLaughlin. Courts are bound by their records. Windsor. See CONSTITUTIONALISM; JURISDICTION.

33. McKYRING v. BULL (1857), 16 N. Y. 297, 69 Am. Dec. 696-707, n.; Field v. Mayor; Bliss, Pl. 327; Pom. Code Rem. 657, 659, 661, 693, 694, 700; Suth. Dam.; And. Steph. Pl. 233, 237.

Cited, §§ 135, 145, 303, Hughes' Proc.

Defenses must be pleaded, or they are waived. J'Anson, Field, Cromwell, Munday cases; Borkenhagen: 81; Wisconsin Co.; Kollock.

Pleading; new matter; payment. A plea of payment must be specially pleaded. McKyring; Suth. Dam. (it is a plea of confession and avoidance); Perot, 17 Colo. 80, 31 Am. St. 258; J'Anson; Mostyn; Field v. Mayor; Mariott; 3 Sedgk. Dam. 1074. It must be pleaded affirmatively. Piercy (Cal.), and proved by a preponderance of testimony. Sampson, 109 Ala. 662, 55 Am. St. 950, n.; Perot. And if a plaintiff must allege non-payment, still a defendant must prove. See NEGATIVE AVERMENTS. Accord and satisfaction must be pleaded. 1 Beach, Cont. 455; Cumber: 308. New matter; joinder of defenses; joint and several answers. 1 Encyc. Pl. & Pr. 830-862. New matter must be pleaded; enumerations of subjects. 1 Encyc. Pl. & Pr. 830-851, Bliss, C. Pl. 339-364; Piercy. A justification must be pleaded. J'Anson; Savacool; And. Steph. Pl., § 116, n.; cases. A discharge must be pleaded. Statute of frauds must be pleaded. Citty v. Manuf. Co., *sub*, FRAUDS AND PERJURIES; Hotchkiss, 36 Vt. 593, 86 Am. Dec. 679-688, n.; Kibby v. Chitwood (1826), 4 T. B. Mon. (Ky.) 91, 16 Am. Dec. 143-150, n. Statute of limitations; defense of, how raised. Brad. Ev. 27; Sturges: 111; Sto. Pl. 751-760. See LIMITATIONS. Rescission of a contract must be pleaded. Mabin, 129 Ind. 430, 28 Am. St. 199. Another suit pending. 1 Encyc. Pl. & Pr. 750-776; Sto. Pl. 736-740, 2 Am. & Eng. Eq. Cas. 195-202. Pendency of another action—this must be pleaded, or it is waived. Williams, 18 Minn. 82, 88; 2 Bates, Pl. 905, And. Steph. Pl. 140. How pleaded and vouched. 2 Gr. Ev. 26; 1 Encyc. Pl. & Pr. 770-776; Sto. Pl. 736-745, 2 Am. & Eng. Eq. Cas. 185-202. Pendency in another state is no defense. Davis, 4 Bush (Ky.), 442, 96 Am. Dec. 309-311, n. In both state and federal courts. Willson, 104 Ky. 165, 42 L. R. A. 449-466, ext. n. Or in another jurisdiction. Kilpatrick, 38 Neb. 620, 41 Am. St. 741, n.; or in different systems of courts. *Id.;* Plume Co. 136 Ill. 163, 29 Am. St. 305. Pendency of one action as a defense to another. Smith (1863), 44 Pa. St. 326, 84 Am. Dec. 448-453, n.; 8 Am. & Eng. Encyc. Law, 549-555; Pars. Conts. 725-728, 2 Chit. Conts. 1169-1189, Sto. Conts. 988; 2 Kent. 122; Sto. Pl. 736-745. Waiver as a defense must be pleaded. Defenses to contracts; performance, etc., must be pleaded. 4 Encyc. Pl. & Pr. 627-633, 944-953. Special damages; facts for, must be alleged. 5 Encyc. Pl. & Pr. 719. Estoppels of all kinds must be pleaded, is the general rule. Wright v. Griffey (Ill.: 28); Borkenhagen (Wis.). See ESTOPPELS. Replevin; general denial will admit all defenses. Horkey, 53 Neb. 522, 68 Am. St. 623. And although a special plea is also pleaded, this does not limit it. Horkey. But it does, on principle. *Verba generalia restringuntur*, etc.; Castro v. Richardson (1861), 18 Cal. 478; Haven v. Seeley (1881), 59 Cal. 494, 496; Egan v. Delaney (1860), 16 Cal. 85; Dane, 114 Ind. 296, 5 Am. St. 621; Dickson: 34.

Leading Cases.—33. McKyring.

34. DICKSON v. COLE (1874), 34 Wis. 621, 626, 627: cases; Pom. Rem. 378: *contra* cases, 35 Wis. 556 (R. R. Cases). *Qualified denials insufficient.* Dickson. See Bell v. Brown; *Allegans contraria non est audiendus.* Cited, §§ 1, 5, 22, 39, 42, 94, 181, 184, 207, 251, 268, 270, 324, Hughes' Proc.

Cited, §§ 52, 53, 71, 165, 236, 270*a*, 272, 276-278, Gr. & Rud.

Admissions in an answer control denials in it. Dickson; Mutual Life Ins. Co. (particular statements control general); Fremont; Ansley, 113 Ala. 467, 59 Am. St. 122; Crater, 4 Colo. 196, 200; Singer Mfg. Co. v. Converse (specific statement limits general denials); Supply Ditch, *sub*, Hume (a plea of recoupment admits the contract sued on); Searle, 10 S. Dak. 312, 39 L. R. A. 345. See Deitsch v. Wiggins (sheriff, denial also admitted). But pleadings should not be double. Sturges: 111. In replevin if the issues are properly raised by the complaint and denials thereof, then in a supposed affirmative defense, which represents a matter already at issue and properly so, the supposed new matter is surplusage, and calls for no reply. Street v. Morgan (1902), 64 Kans. 85 (*Utile per inutile*, etc.).

Leading Cases.—34. Dickson.

A plea of confession and avoidance controls a general denial. Dickson; Crater; Bradbury: 35; Fost. Fed. Prac. 146: cases; Adams, 21 Wall.: 185; Commercial Co., 19 How. 318, 319, appealed from 2 Curt. (U. S.) 524 (if an answer in chancery admits that a proposal for insurance was made and accepted, but adds that no contract was made, the court will not intend that the denial includes any new matter of fact, but will treat it as only containing the respondent's view of the legal consequences of the facts admitted).

Alternative and repugnant pleadings are void. Neither party can employ them. *Ubi eadem ratio,* etc.; Pain: 107.

Every presumption is against a pleader. Verba fortius; Lea: 30. Dovaston: 217.

Admissions of record in a plea or answer control denials. Verba generalia, etc.; Crater; Dickson; Sexton v. Rhames (1860), 13 Wis. 110 (instructive case); Orton v. Noonan (1865), 19 Wis. 370; Farrell v. Hennesy (1867), 21 Wis. 639. Material allegations, if admitted, are conclusive.

A general denial in an answer will not put the plaintiff upon proof of facts elsewhere admitted in the answer. Farrell; Gaines.

Pleadings ought to be true. Graver: 103; Crater; Hensley v. Tartar (1860), 14 Cal. 508; Hannen.

Inconsistent defenses sometimes allowed in pleadings. L. S. R. R. (1885), 3 Wyo. 134, which marshaled the courts of the states, as the judge thought. He denied that the words *"as many defenses as he may have"* (Graver) meant anything in his court. He overlooked Crater and other cases. The court also denied that a plea of confession could be used to overcome inconsistent defenses. In other words, that one may be mendacious if he pleases, and next, that you cannot prove him so by his own solemn admission upon the court's record. *Verba generalia restringuntur,* etc. And fundamental requirements did not weigh with the gathered cases, 11 to 3. The statute was made to read as many defenses as he *wantonly pleases* and *mala fide* imagines. Bell v. Brown (a very equivocal case). Courts that construe a code to exclude Bristow, and that pleadings need not be true, nor used as true and *bona fide,* abandon the base line of procedure. See Dovaston (every presumption is against a pleader); Pain (repugnant pleadings are void).

Wherever pleadings are to limit issues and to narrow proofs, the denial must exist, be understood and rightly respected. To judge rightly of its necessity and importance it must be viewed from the grounds and rudiments of law, and especially from convenience; § 53, Gr. & Rud. Convenience; also certainty. The allegation, the admission, the denial and the issue are interwoven with the conserving principles of procedure. §§ 83-123, Gr. & Rud. The import and significance of the mandatory record must be understood. Bradbury: 35.

Posito uno oppositorum negatur alterum; Allegans contraria non est audiendus. Pain: 107; SHAM PLEADINGS.

The mandatory record and its functions must ever be kept in view by the practitioner. To declare for it on one hand and impugn it on the other is to dismember procedure and all that depends upon it. §§ 83-123, Gr. & Rud.

One of the high functions of a record is to inform the court what is in dispute—what is alleged, what admitted and what denied. A court should accept what both parties are agreed upon as shown by the record, unless it is absurd, impossible or illegal. Weltmer: 268a. What a defendant believes, the court should believe, if consistent with the claims of the plaintiff and reason. See *Ad damnum.*

It is a rule in equity, that what a defendant believes the court will believe. Potter (1749), 1 Vesey, Sr. 274, 3 Atk. 719, Amb. 98, 26 Eng. Rep. 212, 5 Mews' E. C. L. 791; Hill v. Binney (1802), 6 Vesey, 738, 31 Eng. Rep. 1284, 6 Mews' 1649, Fost. Fed. Prac. 265.

A plaintiff must avoid repugnancy in his allegations. Pain. Accordingly, a defendant must be equally guarded, for the rule is, from beginning to end, "every presumption is against a pleader." Dovaston; *Verba fortius.*

Strict rules govern the formation of an issue. Seattle Bk.; Garland. One desiring a trial must make an issue, and with clearness and certainty. He must be definite and his pleading must not be inconsistent and repugnant. Dickson; Seattle; Preston v. McCormick (1877), 12 Bush (Ky.), 570, 582; Crater. *Contra:* Colorado cases; 48 L. R. A. 177; 32 Colo. 51; 437, 443, 444; Deitsch.

Admissions upon a court's record are uncontrollable—are irrefragable—and cannot be impugned or impaired by evidence aliunde. And this is the rule in federal courts. Fost. Fed. Prac. 148, 265, 266; Bissell: 42.

Bradbury. Material allegations not denied are admitted. See ADMISSIONS. And if by demurrer, this is admissible in other cases. Nispel, 74 Ill. 306; Slater, 51 Neb. 108, 66 Am. St. 444. And these cannot be contradicted nor disregarded. Bradbury; Dickson; McLaughlin. Admissions upon the *record* are the highest of evidence, are conclusive and cannot be contradicted. Bissell.

Admissions in pleadings control denials. Crater; Supply Ditch Co. v. Elliott; Dickson; Adams, *supra.*

The pleadings may be read to the jury and the jury can find no fact against them. Lettick, 63 Ill. 335; Gould, Pl. (3d ed.), p. 152, § 168.

Facts admitted need not be proved. First Nat. Bank, 158 Mo. 668, 81 Am. St. 332. Evidence to prove such facts is surplusage, and should be rejected as such. A court

Leading Cases.—34. Dickson.

has no power to demand nor to receive such. Munday: 79; Shutte: 291. Allegations are essential for the admissibility of evidence. Borkenhagen: 81. Brown, Jurisdiction; *De non apparentibus,* etc.

Nor can evidence be admitted where there are no allegations. Borkenhagen; Shutte: 291; Johnson, 124 Ala. 508, 83 Am. St. 196. Courts are bound by their records. McLaughlin (the record must speak for itself): 31.

One desiring to raise an issue, to make a denial or set up matter in defense, is given the opportunity, and if he then fails, *Volenti non fit injuria* applies to him, and to his claims after he has abandoned them. *Debile fundamentum fallit opus.* If he waives his rights then they are waived forever, and in no way can they be afterward restored. Defenses not pleaded are waived. J'Anson: 91; Crepps: 113; Cromwell: 26.

Denials in equity—injunction cases. Poor (must be positive and unequivocal); Cole Silver Min. Co.

Pleadings are evidence. Every statement of a fact material to the issues made in the pleadings (North. P. R., 119 U. S. 561), affidavits (National Steamship Co., 143 U. S. 28), or other documents used in support of the claim of any party to a suit, who is of full age, whether sworn or not, may be used as evidence against him upon the hearing. 1 Fost. Fed. Prac. 265. The filing of a general replication does not waive the right to rely on admissions in an answer or plea. Cavender, 8 Fed. 641. A cross bill in equity must be consistent with an answer filed. Sto. Pl. 399, n. (10th ed.). An admission in an unverified pleading in another suit which was signed only by an attorney cannot be admitted in evidence. Delaware County, 133 U. S. 473, 487. Statements in a verified pleading verified by a party in another suit, are admissible in evidence. Balloch, 146 U. S. 363; Pope v. Allis (1885), 115 U. S. 363; Bolleau: 43.

Failure to waive an answer under oath, admits such credibility of a defendant as gives his verified answer the force and effect of a witness. Vigel v. Hopp (1881), 104 U. S. 441; Bonnell, 185; Ropes v. Jenerson; 16 Cyc. 392, 393.

What the parties believe, the court believes, unless it is absurd and impossible. *Ad damnum.* Courts will look and consider from a subject matter.

Admissions in a pleading are binding. Fost. Fed. Prac. 148; Gold Co., 6 Blatch. 307, 310.

A vendee of personalty set up: (1) A general denial, (2) rescission of the contract, (3) a counter claim for breach of warranty, (4) damages for false representations in the sale, and (5) by an amendment that he bought it as agent. *Held:* permissible. Cole, 121 Iowa, 146. (In Iowa and Kentucky inconsistent defenses are permissible if the verification states which one is true is unknown, but

Leading Cases.—34. Dickson.

one is true. The *bona fide* pleading is respected and sought); Pom. Rem. 722 (favors inconsistent defenses); *Contra:* Maxw. Code Pl., p. 397; Bliss, 343, *Contra:* Seattle Bk.; Seattle Bk. v. Carter (1895), 13 Wash. 281, Burnside, 73 Conn. 83, Murphy, 8 Idaho, 133, 67 Pac. 421; Steenerson, 52 Minn. 211; Oakes, 61 Neb. 6, Ins. Co., 63 Ohio 258; Baines, 41 Ore. 135. *Generally they are not inconsistent unless the proof of one disproves the other.* 2 Mich. Law. Rev. 419.

Inconsistent defenses permissible: Banta, 121 Cal. 414, Hill, 29 Colo. 161, Weston, 33 Ind. 486; one may deny the allegations of slander and also plead in confession and avoidance. Houston Ry., 96 Tex. 121, 97 Am. St. 877. De Lissa, 59 Kan. 319, Societa Italiana, 138 N. Y. 468, Seeman, 54 N. Y. Supp. 564, 25 Misc. 328; McLamb, 126 N. C. 218; Millan, 54 S. C. 485; Green, 5 S. Dak. 452; Paul v. Luttrell (Colo.); 16 Cyc. 389.

The following cases may be considered upon the question of what are sufficient denials: Ansley (a plea of set-off admits the contract); Richardson; Blood; Cannon; San Francisco Co.; Robbins; Doll; Higgins; Siter; Banta v. Savage; Blood (denials must be certain); Bell v. Culpepper (denials must be exact); Burley (general denial sufficient under code if waived); Burnley (S. P. Poor); Bell v. Brown (equivocal—repugnant views); Clark v. Van Riemsdyk (denials must be certain—Poor); Cole Silver Min. Co. (denials must be certain to dissolve an injunction); Tate v. P. (negative pregnant denials bad; Doll); Tynan v. Walker (bad denials may be waived); Crain v. U. S. (plea of not guilty essential in the right record). S. P. Aylesworth v. P.; Munday v. Vail: 79: Cases.

35. BRADBURY v. CRONISE (1873), 46 Cal. 287, 9 Mor. Min. Rep. 306.

Cited, §§ 2, 12, 14, 94, 168, 186, 203, 207, 251, Hughes' Proc. Cited, §§ 54, 198, 272, 278, Gr. & Rud.

Admissions upon the mandatory record control upon appeal. Nothing in opposition to these can be considered. *De non apparentibus,* etc.; Bissell: 42; Fost. Fed. Prac. 148, 265, 266 (what a defendant believes a court will believe).

Evidence against admissions upon the mandatory record is inadmissible. Shutte v. Thompson: 291. The only relevant evidence is that which corresponds with the allegations. All other is irrelevant—surplusage. It cannot add to nor vary that record. *In præsentia majoris,* etc.; Cooch v. Goodman.

36. SEATTLE NATIONAL BANK v. JONES (1895), 13 Wash. 285, 48 L. R. A. 177-210, ext. n. These notes indicate the bewilderment.

Cited, §§ 18, 21, 40, 42, Hughes' Proc.

Right to plead inconsistent defenses. S. P. as Dickson (a plea of confession overcomes a general denial). See Seattle Bk. v. Jones; Bailey: 44; Graver: 103.

Leading Cases.—

37. POOR v. CARLETON (1837), 3 Sum. (U. S.) 70, No. 11272 Fed. Cas., Story, J., 2 Lead. Eq. Cas. 1413, 1414, 2 High, Inj. 1505-1527, 1 Beach, Inj. 105, 144, 299-315, Adams, Eq. 196, n., Cole Min.

Cited, p. 39; §§ 93, 251, Hughes' Proc.

Denial; its requirements. Poor; Dinehart; Minturn. Must be positive and unequivocal. Searle, 10 S. Dak. 312, 39 L. R. A. 345; Dickson.

Denial must be perfect to weigh in an answer in equity. See Burnley; Cannon; Bell; Clark's Executors; U. S. v. McAllister; Minturn; Doll; Higgins; Humphreys; Cole Silver.

The requirements of the denial in Poor, Humphreys, Doll, Dinehart and Shricker v. Field, Ia., should be carefully considered. In some states, the rule in Dickson is uniformly upheld; in others it is in conflict; in others the general issue is upheld. The Wisconsin cases are consistent. Kollock.

38. HUMPHREYS v. McCALL (1858), 9 Cal. 59, 70 Am. Dec. 621, ext. n., Bliss, Code Pl. 326; Avery, 136 N. C. 426, 68 L. R. A. 776; 1 Encyc. Pl. & Prac. 875.

Cited, §§ 40, 93, 184, Hughes' Proc.

What is a sufficient issue. Poor; Doll.

A bona fide denial is essential else it is frivolous and a nullity. Bliss, Pl. 421.

Denials on information and belief. Humphreys; Dinehart; 1 High, Injunc. 34, 35; Sto. Pl. 852, 855, 855a; Jones v. P., Millsted; Haney v. P. Denial of what one is presumed to know upon information and belief raises no issue.

39. RAYMOND v. JOHNSON (1897), 17 Wash. 232, 61 Am. St. 908, n. Denial upon information and belief of what one is presumed to know raises no issue. Humphreys. See FALSE AND SHAM PLEAS.

40. GARLAND v. GAINES (1901), 73 Conn. 662, 49 Atl. 19, 84 Am. St. 182.

Cited, § 39, 42, Hughes' Proc.

Denials; insufficient raises no issue and allegation is admitted and requires no proof.

"The plaintiff was not required under the pleadings to prove the execution of the contract of guaranty. The defendant's answer, that he had no information or knowledge sufficient to form a belief, made to that paragraph of the complaint which alleges that on or about July 23, 1898, said lease was returned to the plaintiff signed by the defendant, as guarantor, and by Thomas J. Gaines, Jr., was not a compliance with the provisions or § 874 of the General Statutes requiring that if the defendant intends to controvert the execution or delivery of any written instrument or recognizance sued upon, he shall deny the same in his answer specifically. The answer made was equivalent to a statement that the defendant could not in good faith deny the execution of the guaranty, but that he would not admit it. Sayles v. Fitzgerald, 72 Conn. 391, 44 Atl. 732. But it is only when specifically denied that the plaintiff is required to prove such execution." 73 Conn. 665.

Garland on a statute from the English Judicature Act, it having been re-enacted in Connecticut, which is the only American state that has borrowed it. Evidently it is much opposed to false, sham and evasive pleadings. What is a sufficient denial is one of the most vexed and confusing of questions as will appear from the 48 L. R. A. 177-210: cases.

Leading Cases.—40. Garland.

Stamping of instruments: of the failure to comply with the statute. Garland, 84 Am. St. 182-199, ext. n.

41. OSCANYAN v. WINCHESTER ARMS CO. (1880), 103 U. S. 261 (26 L. ed. 539), 17 Am. Law Reg. (N. S.) 626. Cited, Benj. Sales, Gr. Pub. Pol., Beach, Conts., Hughes' Conts., Reinh. Ag. 72, 74, 82.

Cited, p. 13; §§ 5, 18. 133, 154, 156, 158, 184, 299, 324, Hughes' Proc.

Cited, §§ 100, 123, 169, 285, 307, Gr. & Rud.

Solemn judicial statements or admissions of counsel bind a client. 1 Gr. Ev. 205; 3 id. 39; Mahan. Attorneys responsible for their representations. See ATTORNEYS; Woodstock Iron Co., 129 U. S. 643; Payne: 307. Agent's admission binds principal, if within the scope of the agency. Mahan; Loomis, 159 Mass. 39, 37 Cent. L. J. 150, n.; U. S. v. Gooding: 202.

Illegal contracts will not be enforced. See *In pari; In æquali melior est conditio possidentis.* §§ 154-157, Hughes' Proc.

42. BISSELL v. SPRING VALLEY TOWNSHIP (1888), 124 U. S. 225 (37 L. ed. 411), 8 Sup. Ct. R. 495, Van Fleet, For. Adj. pp. 668-776, 2 Black. Judg. 751, 1 Dill Munic. Corp. 486, 543, Freeman, Judg. 267, Bigl. Fraud. 57, 65 Kan. 348, 93 Am. St. 286; 205 U. S. 131.

Cited, § 2, Hughes' Proc.

Election to stand by a demurrer is final and conclusive; it is an election of remedy. If one elects to stand upon a demurrer, after judgment against him sustaining the demurrer, this is an election and is final and conclusive. Bissell; Sutter, 36 Cal. 112; Whiting, 37 N. Y. 600; Piper v. Hoard (1867), 107 N. Y. 67-83, 1 Am. St. 789, 11 N. Y. St. Rep. 375, 6 Encyc. Pl. & Pr. 353, 356. *Allegans contraria,* etc. 205 U. S. 122.

"The entry of final judgment on demurrer concludes the parties to it, by way of estoppel, in a subsequent action between the same parties on a different claim, so far as the new controversy relates to the matters litigated and determined in the prior action."

"A final judgment for defendant in an action against a municipal corporation to recover on coupons attached to bonds purporting to have been issued by the corporaton, enter on demurrer to an answer setting up facts showing that the bonds were never executed by the municipality, concludes the plaintiff in a subsequent action against the municipality to recover on other coupons cut from the same bonds. Cromwell v. County of Sac distinguished." Garden City, 65 Kan. 845, 93 Am. St. 284.

"Admissions by demurrer are admissions upon record and as such they are of the highest and most conclusive character. A judgment rendered upon demurrer is equally conclusive (by way of estoppel) of the facts confessed by the demurrer, as a verdict finding the same facts would have been; since they are established, as well

Leading Cases.—42. Bissell.

in the former case as in the latter, by way of *record*. And facts thus established can never afterward be contested between the same parties, or those in privity with them." 124 U. S. 232; Gould, Pl. Chap. IX, Pat. 1, § 43; Dickson; Bouchaud, 3 Denio, 238.

Hahl is highly instructive as to how contract rights are affected by rules of procedure—how "adjective" law affects "substantive."

Non suit; Dismissal; Judgment by, is not. Sub, Cromwell. See Carten, 43 S. C. 221, 49 Am. St. 829, n.

Defaults; Judgment upon conclusive. Last Chance Min. Co., 157 U. S. 683.

Judgments must be upon merits. Greely; Note, 14 L. Ed. (U. S.) 971; Williams v. Hewitt (1895), 47 La. 1076, 49 Am. St. 394; Bigl. Estop. 37; 1 Freem. Judg. 267; 6 Encyc. Pl. & Pr. 356. Dismissal of cause after leave granted to amend removes the bar, it seems. 6 Encyc. Pl. & Pr. 356.

Defective pleading; Demurrer: omitted facts if supplied in a new pleading are not barred. 2 Black. Judg. 708: cases: Los Angeles, 59 Cal. 444: Gilman, 1 Pet. U. S. 298; Wilber, 21 Pick. 250; Birch, 2 Metcalf (Ky.), 544; 3 Sm. Lead. Cas. 2087; cases, 9th ed.; Rodman, 59 Mich. 395; Gould, 91 U. S. 534.

But of course the identical facts are barred. 2 Black. Judg. 709; Alley, 111 U. S. 472; Cromwell.

Same cause of action; what is. Taylor v. Castle.

Functions and domain of demurrers. The importance of a demurrer may be judged from the reported cases. It affects nearly every litigated case; its function is to raise an issue of law in contradistinction from an issue of fact; its issues are to secure a record good in form and sufficient in substance to sustain the application of judicatory power. Lea; R. v. Vaux; McAllister; Hopper.

The sufficiency of every affirmative fact averred, may be tested by a demurrer, and it in some form may be lodged to every pleading. In equity, a demurrer is laid to statement of facts in the bill only. Sto. Eq. Pl. 456; it did not lie to an answer or plea. Exceptions lay to these. Demurrers to answers are unknown in equity; but objection could be made at any time and at any stage. McCurry, 108 Ala. 451, 54 Am. St. 177. It is submitted if the written objections to it are not preferable,—are not the better practice. And it will lie to a denial at common law. 1 Chit. Pl. 656, 7th ed. 651; 16th Am. ed. And it should be admitted in statutory proceedings by necessary implication. *Expressio eorum,* etc.; Bates; McLaughlin. Some formal objections may be reached by demurrer, but generally these are the subject of exceptions in equity or of motions at law and likewise under codes; grounds of demurrer are specified and to these apply *Expressio unius,* etc. Kraner: 299.

Leading Cases.—42. Bissell.

The separating line between formal demurrers and motions is not always clear and traceable. One test of difference is nothing more tangible and fixed than this, that if a motion to strike and make certain must be argued, then a demurrer is necessary. Cottrill, 40 Wis. 553, 559. This leaves it somewhat like the ebb and flow of the tide; it leaves a wide margin of difference; so much depends on the lawyership of the judge. Sufficiency and form must be tested by demurrer. Consolidated, 166 Ill. 361, 38 L. R. A. 624. Motions; functions of. P. v. McCumber: 110.

Lawyers are deeply grounded on the distinctions between dilatory procedure, Kraner, and essential procedure or pleadings to the merits, and upon this desideratum depends the utility of the last rule. Any comprehensive view of a demurrer and its functions, suggests many ideas of great practical importance in procedure, and also of the inseparable incident of every legal subject, which is, of course, construction. From this standpoint a volume could be written, for it affords so many generalizations; so many verifying deductions can be made; instructive comparisons and analogies are constantly awakened, and the rationale of many germane rules may be pointed out from commanding, interesting and instructive viewpoints.

Waiver also attends, and, too, in its immensity and under its varied nomenclature, *e. g.* aider by pleading over (Boyd), or by verdict (Rushton), or errors cured by judgment. *Consensus tollit errorem.* What is waived by not demurring and what is waived by answering, demands close and critical attention in a great number of cases. This brings into view what lies over and beyond and among these, and what is subject to collateral attack, what is a nullity and what a mere irregularity, or what is void and what is merely voidable. These are elsewhere discussed. *Consensus tollit errorem:* R. v. Waters; R. v. Waverton; Rushton; Hopper; McAllister.

The rules of *res adjudicata* (1 Herm. Estop. 31; Kingston's Case), the ultimate mesh through which the pleadings must pass, must be reviewed and finally passed upon, should attend the construction of every pleading, 1 Gr. Ev. 63; 2 *id.* 7; 3 *id.* 10; Bristow: 135; Lea: 30; Wright: 28; S. v. Beach: 258.

A plea of res adjudicata is an odious and disfavored plea. Lea: 30; Kingston's: 76; Outram: 26. And to this, in all its strictness and technical requirements, pleadings may ultimately be subjected. Kingston's and rules, *id.* For this purpose is one of their chief functions; for this test they are devised. The court that announces liberal and loose rules at the threshold, and both strict and technical ones at the dome, makes of the law a mire of absurdity and anything

Leading Cases.—42. Bissell.

but the perfection of reason. *Sub,* Bristow; notes to Lampleigh; *De non apparentibus,* etc.

What is waived by not demurring. Auburn; 6 Encyc. Pl. & Pr. 372; *Consensus tollit errorem;* Rushton. What a general demurrer reaches cannot be waived; such matter is open to both direct and collateral attack. Rushton; Bartlett; Skeate; Moore v. C.; Dovaston; McAllister; Sto. Pl. 4, 10, 24-28, 257; 6 Encyc. Pl. & Pr. 372. See Bish. Cr. Proc. 1286.

A pleading that will not support a plea of *res adjudicata* may be objected to at any time and in any way, and codes so declare. Auburn; Bliss, Pl. 422.

43. BOILEAU v. BUTLIN (1848), 2 Exch. (Eng.) 664, Bro. Max. 339, Langd. Eq. Pl.; 6 Mews' E. C. L. 364.

Cited, §§ 94, 334, 337, Hughes' Proc.; § 53, Gr. & Rud.

"The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not, it would seem, to be treated as confessions of the truth of the facts stated." Boileau; Mondel: 77; Brittain v. Kinnaird: 50.

A material allegation in a pleading, which is not traversed, is so far admitted that it is not competent to the other party to disprove it. Bouzi, 4 Man. & G. 295 (43 E. C. L. R. 158), 5 Scott, N. R. 1, 11 Mews' E. C. L. 915. See rules of *Res Adjudicata;* Foster, Fed. Prac. 148, 266; Langd. Eq. Pl. 12, 33 (exceptions stated); Whitney v. Dresser, 200 U. S. 532 (sworn proof of claim is evidence in bankruptcy); 16 Cyc. 383.

Codes very clearly adopt the rule that admissions upon the record are conclusive, and cannot be contradicted. Dickson; Bissell; Crater; Bradbury; C. v. Kane: 183: Cases; 8 Encyc. Pl. & Prac. 19-34; 1 Gr. Ev. 171, n.; Slater, 51 Neb. 108, 66 Am. St. 444, n.; Kollock. See ADMISSIONS.

Allegations are evidence in other cases. Pope, 115 U. S. 563: cases; Huff. & W. Conts. 595; *Allegans contraria non est audiendus.* See *Res Adjudicata;* Outram; Cromwell; Holman, 117 Iowa, 268, 62 L. R. A. 395 (admissions in other cases with third persons admissible); Wagner v. Gibbs: 290; Brittain: 50.

Allegation of value in attachment affidavit is conclusive upon affiant, in action; on the bond. 94 Am. St. 293.

One view of pleadings is from the conserving principles of procedure. From these, what a person alleges, what he admits and what he denies is of far greater significance than where those policies are overlooked, and where pleadings are viewed as a formal and inconsequential exchange of charges and denials, that may be departed from at any moment, and anywhere. The decisions show both these views are abroad. See THEORY OF THE CASE; Rushton; Russell v. Place.

Wherever false and sham pleadings are excluded and punished, there the formal, deliberate, written statements upon a court's records are held to conclude. Graver. See ESTOPPEL; REPUGNANCY; *Allegans contraria,* etc. 2 Sm. Lead. Cas. 950, 951, 8th ed.

Injunction; the pleadings as evidence. Dinehart: 279.

In federal practice, if an answer under oath is not waived and it is accordingly verified, then it must be overcome by at least two witnesses, or by one witness and strong corroborating circumstances. Here as strict proof is required as in perjury or treason. Vigel, 104 U. S. 441; 2 Sto. Eq. 1528; Fost. Fed. Prac. 84, 148, 266 (admission in pleading); Jordan v. Parmele, 2 Allen, 212; Ropes.

44. BAILEY v. BAILEY (1863), 44 Pa. 274, notes to Kingston's Case, 2 Smith, Lead. Cas. 951, 8th ed.; 1 Herm. Estop. 285 (quoting Smith, Lead. Cas.), 1187 (election); Garland v. Wholebau.

Cited, §§ 5*b*, 182, 308, 337, Hughes' Proc.

Cited, §§ 171, 173, 174, 179, Gr. & Rud.

Allegans contraria, etc. In 1861, Mr. Bailey obtained a decree of divorce. A few months later the divorcee sued him as *femme sole* in replevin for goods, and as such recovered a judgment against him for $125.00. This she could not have done as a *femme covert.* She had appealed from the divorce decree, and this appeal was pending during the prosecution of the replevin suit. Bailey, by leave of the supreme court, *pleaded the record of the replevin proceedings in bar of the errors assigned in the supreme court.* This record was unsuccessfully demurred to in the supreme court, upon the ground that the wife was estopped by her replevin proceedings from further contending that she was not lawfully divorced. See Kingston's. The court classified such estoppels as *in pais. Contra:* Terry (record admitted to prove without pleading it).

The legal assertion of a right acquired by a valid decree of court will estop or bar the plaintiff therein from all proceedings thereafter to invalidate the decree under which the asserted right has been claimed. One cannot approbate and reprobate at the same time. U. S. Co., 70 Neb. 144, 113 Am. St. 783-788. *Allegans.*

There are four kinds of estoppel: Estoppel of record (res adjudicata), estoppel by deed, estoppel in pais, or equitable estoppel, and estoppel in pais from act and conduct in official proceedings, as in Bailey; 2 Smith, Lead. Cas. 950, 951: cases; quoted, 1 Herm. Estop. 285. See Terry. These four species should be familiar to the practitioner. The law re-

Leading Cases.—44. Bailey.

lating to them is vast, technical, but nevertheless of the most useful character, and everywhere pervades the law of procedure as well as all other leading subjects.

A party cannot be heard to impeach a judgment which he himself has procured to be entered in his own favor. Starbuck, 173 N. Y. 503, 93 Am. St. 631; Bailey v. Hornthal; Taylor, 136 Ala. 354, 96 Am. St. 26 (one dismissing an appeal because the judgment was not final cannot afterward allege it is final). See Fletcher v. Trewalla; Campbell v. Porter: 2.

One accepting benefits under a judgment cannot impeach it. *Allegans,* etc.

Unconstitutional statute; one may estop himself from objecting to. Shephard v. Barron (1904), 194 U. S. 553; P. ex rel. Lewis v. Waite (1873), 70 Ill. 25.

45. ROBINSON v. BAILEY (1757), 1 Burr. (Eng.), 316, 1 Sm. L. C. 1378-1383, n. Omitted in 9th, 10th and 11th eds.

Cited, §§ 5, 15, 21, 22, 47, Hughes' Proc.; §§ 11, 112, 122, 196, Gr. & Rud.

Duplicity in pleadings faulty. Lea: 30; 1 Chit. Pl. 558, 16th Am. ed., 7 Encyc. Pl. & Pr. 236-244. See *Res Adjudicata;* ALTERNATIVE PLEADINGS; Pain: 107.

Pleadings can be made instruments of chicane. Robinson, *sub,* Cutter; Dickson. On a question of duplicity merely, Lord Mansfield observed:

"The substantial pleadings are founded in a strong sense, and in the soundest and closest logic, and so appear when well understood and explained; though by being misundersood and misapplied they are often made use of as instruments of chicane."

See title page of Martin on Common LAW PROCEDURE; FALSE AND SHAM PLEADINGS; Graver.

The importance of pleadings can only be appreciated by those who view them from the conserving principles of procedure, and upon what these depend, namely the mandatory record, §§ 83-123, Gr & Rud.

From those matters only can pleading and important rules of evidence be rightly learned, perceived and understood. See IDENTIFICATION; VARIANCE; DEPARTURE; CERTAINTY. The fountains must be sought. See EQUITY. Unless these are known the study of procedure is "a grope in the dark." Bliss Pl. 141. *Melius petere fontes quam sectari rivulos.*

The law of the denial, L. C. 34-44, Gr. & Rud., should be considered. As it is to the denial so it is to the allegation, the admission and the issue. It is a Babel. In several states pleadings are made instruments of chicane. See THEORY OF THE CASE. They are not viewed from the grounds and rudiments of law. See DOLUS; GENERAL DENIAL; GENERAL ISSUE; CONCLUSIONS.

46. IVERSLIE v. SPAULDING (1873), 32 Wis. 394; 2 Cool. Tax. 919, 930, 936. Cited, Hughes' Conts.

Cited, pp. 15, 16; §§ 1. 5*a*, 9, 13, 15, 24, 29, 44, 72, 73, 76, 98, 104, 105, 110, 122, 126,

Leading Cases.—46. Iverslie.

142, 145, 170, 186, 187, 188, 200, 239, 245, Hughes' Proc.

Cited, §§ 59, 108, 119, 125, 180, 210, 218, 224, 269, 272, 278, Gr. & Rud.

An affidavit for publication of notice of a tax sale must be and appear of record. Rustin v. Merchants' Bk.: 134.

"What ought to be of record must be proved by record and by the right record." § 104, Gr. & Rud. See Crain v. U. S.: Cases. ORAL EVIDENCE. Best, Ev., §§ 417-422, 427, 543; Freem. Judg. 76; Haven, 121 Mich. 51, 80 Am. St. 477-484, n., 1 Gr. Ev. 19, 538; Martin v. Barber (1891), 140 U. S. 634; Cool. Tax. 926; Deputron, 121.

The mandatory record must be understood. Its necessity will appear from both preceding and following cases. It is a first requirement of limited government, and of its procedure. To impress its uses we further observe:

"A record imports absolute and complete verity. It is neither to be increased nor diminished by averment out of or beyond the record. It is to the record as the law and the testimony which the pleader refers his claim." Miller, 35 N. J. Law, 389; Dimick, 21 Vt. 569, 578; Freem. Judg. 35, 37, 76, 80 Am. St. 481, n.; Campbell v. Greer; Mobley v. Nave.

There can be no oral levy and collection of a tax. Martin; Mosher: 125; Welty, Assess., §§ 279, 283.

Statutory tribunals, e. g., boards of county commissioners, must make and keep a record. Brown: 131. See Galpin; Walker: 118 (justice must keep a record, and to it applies *Expressio unius,* etc.), Martin; Runkle: 120; Piper: 113; Hannah: 128.

Public corporations must comply with the law; this is mandatory. Hunt v. Wimbledon Local Board (1878), 3 C. P. D. 208-215, 4 C. P. D. 48-62, 16 Rul. Cas. 237; Young v. The Mayor, 8 App. Cas. 517-529, 16 Rul. Cas. 654, n.; School District, 115 Pa. 559, 9 Atl. 64, *post;* 1 Dill. Munic. Corp. 301: cases, 449; Jordan v. School District (1854), 38 Me. 164, 1 Beach, Pub. Corp. 377, 378.

Courts that construe statute commands away as to what a complaint or other pleading shall contain, or what shall be shown from a docket or record, deny the above rules. *De non apparentibus,* etc.: Max. No. 2, §§ 78-85, Hughes' Proc.

Legislative journals are exclusive and conclusive. Taylor v. Beckham (1900), 178 U. S. 548: cases, Suth. Stat. 27-54.

Mandatory record is an implication. Freem. Judg. 35, 37, 76. See *id.* It is not a subject of waiver or of contract. See CONSTRUCTIVE NOTICE; COLLATERAL ATTACK. Campbell v. Porter; People's Bank v. Calhoun. But see Hume (Colo.)

Jurisdictional facts not supplied with favor. Hannah, 128. See 81 Am. St. 535-562; Dovaston; *Verba fortius,* etc.

Titles to property are founded on records and official deeds as well as private deeds. Therefore it is important for all to understand the necessity for and the suffi-

Leading Cases.—46. Iverslie.

ciency of a record or a judgment or decree or a sheriff's or a tax deed as well as of any other kind. See CONSTRUCTIVE NOTICE; Deputron; Hume. *There must be pleadings.* And they must be certain. *Fabula non judicium.* And each pleading should perform its proper function, and appear at the right place, at the right time, and from the right hand. Constructive notice requires this. The division of state power also requires it. The requirements for the conserving principle of procedure depend upon the mandatory record. §§ 1-10, Hughes' Proc.; §§ 83-123, Gr. & Rud.; L. C. 1-79, *infra.*

What ought to be of record must be proved by record and the right record; Windsor.

46a. MOBLEY v. NAVE (1878), 67 Mo. 546-550.

Oral evidence is inadmissible to impeach record evidence in a collateral proceeding. If a record shows a court was adjourned on a certain day, such record is conclusive of that fact. Such record can only be corrected in a direct proceeding. Campbell v. Greer: 2*a.*

"Proceedings in a court of record can only be known by the record" (549), what ought to be of record must be proved by record, and by the right record. 105 Mo. Ap. 1, 694; Planing Mill Co. v. Chicago.

47. MONTGOMERY BEER BOTTLING WORKS v. GASTON (1899), 126 Ala. 425, 51 L. R. A. 396, 26 So. 497, 85 Am. St. 42; cited, Hughes' Conts.

Record defined; loose file papers do not constitute. A constitution requiring a record means a bound volume deposited with the secretary of state, and not loose file papers. See CONSTRUCTIVE NOTICE. Taxation proceedings must be of record. Rustin; Moser. Tribunals must speak by their records. Iverslie; Mobley v. Nave; People's Bank v. Calhoun; 1 Freem. Judg. 37, 76.

Legislative journals as evidence of the passage of statutes. 47 Am. St. 814-823, 51 Am. Dec. 616-623; 75 Am. St. 889; Suth. Stat. 27-50.

48. BAUERMAN v. RADENIUS (1796), 7 Term. Rep. (D. & E.) 663, 2 Esp. 633, 2 Sm. L. C. 1001-1025 (8th ed.); omitted in 9th ed.; 6 Mews' E. C. L. 498, 690.

Cited, §§ 120, 135, 223, 230, 306, 334, Hughes' Proc.

Oral evidence to add to record; res adjudicata. Real party directing, controlling and managing litigation may be shown by oral proofs. Cromwell; Lovejoy; Brown, 21 Colo. 309, 52 Am. St. 228, Herm. Estop. 156, 186: cases, 2 Smith, L. C. 955 (8th ed.), 2 *id.* 801 (side p. 683, 7th ed.); cases, 1 Bailey, Jurisdic. 256: cases; Bridges v. McAllister (1899), 106 Ky. 791, 45 L. R. A. 800.

Records are irrefragable as to issue. Mondel: 77.

Liability of one carrying on litigation in the name of another. Getchel Co., 117 Ia. 180, 62 L. R. A. 617, n. (Costs.) A receipt is not conclusive evidence against a party who signs it. Bauerman; 1 Gr. Ev. 212, 305; 2 *id.* 516. See RECEIPT.

Leading Cases.—

49. STUBBINGS v. EVANSTON (1895), 156 Ill. 338. *Records from superior courts must be certain.* That they are *coram judice* must affirmatively appear. People's Bank v. Calhoun. For this a placitum is necessary; and this must correspond with the bill of exceptions as to who tried the case. In Colorado, even where records are waived, nevertheless a placitum must appear and technically attest facts, or the record will not be opened, except to see that there is a judgment to reverse. Skinner.

A placitum must affirmatively appear; its omission cannot be aided by the statutory record. Planing Mill Co. v. Chicago: 2*d;* 1 Freem. Judg. 77. Still, it is held that a record, without a placitum to prove judgment, must be objected to. Hyde, 75 Ill. 381.

Plaintiffs — appellants — are charged with making a proper record. McArthur: 99. See APPELLATE PROCEDURE; Conductors, etc.; Garland: 294, 60; Best, Ev. 252.

50. BRITTAIN v. KINNAIRD (1819), 1 Brod. & Bing. 432 (5 E. C. L. R. 725), Gow. 164, 4 Moore, 50, 21 R. R. 680, Smith, Cas. Torts, 645, Bailey, Jurisdic. 83, 15 Ind. 395, 421: cases, Whart. Ev., 6 Mews' E. C. L.

Records are conclusive evidence. Mondel: 77. See *Res Adjudicata;* 1 Gr. Ev. 275, n. (oral evidence); *Expressio unius,* etc. See RECORDS.

Brittain stated: Trespass for seizing and taking possession of a certain vessel called The Phœnix, and detaining the same, with five hundred pounds of gunpowder. Plea, general issue. At the trial plaintiffs offered to prove that the vessel was not a boat within the meaning of a statute authorizing the seizure and forfeiture of the boat. Defendants relied upon a justice's record, regular upon its face, which found that the vessel was a boat, and this record was held irrefragable and conclusive. See Needham: 261. *Res Adjudicata Posito.*

Record in one case, when admissible in another. Wagner: 290; Boileau: 43.

51. HAUSWIRTH v. SULLIVAN (1886), 6 Mont. 203, 9 Pac. Rep. 978; Brown, Jurisdic.

Cited, p. 16, §§ 5, 31, 52, 147, Hughes' Proc. *Cited,* §§ 70, 108, 240, Gr. & Rud.

Returns of officers of service of process may be impeached. Ex dolo malo, etc.; Needham; Campbell, etc., Co., 50 Neb. 283, 61 Am. St. 573, n.; Ald. Jud. Writs; Smith, 11 Colo. Ap. 284; Week, Attys. 204. See Bailey, Jurisdic. 147; McClung, 47 W. Va. 150, 81 Am. St. 785.

Sunday; process cannot be served upon. Hauswirth; S. v. Conwell: 174.

Setting aside judgments. Hauswirth; Ferguson: 264; Furman: 262; 2 Page Conts. 1209.

Record; setting aside for fraud.

Amendment of return not allowed after suit commenced to set aside the judgment. Smoot, 161 Mo. 673, 84 Am. St. 738.

Returns conclusive in collateral proceedings. Michels, 52 Mich. 260; Rood, Garnish. 83.

Leading Cases.—51. Hauswirth.

Return of officer not conclusive in habeas corpus. Hardigan, 57 Vt. 100, 5 Am. Cr. R. 269.

52. PYM v. CAMPBELL (1856), 6 El. & Bl. 370 (88 E. C. L. R.), Thayer, Cas. Ev. 867; Davis v. Jones, 17 C. B. 625; Furness v. Meek, 27 L. J. Exch. 34; Laws. Conts. 376; 2 Page Conts. 1209.

Cited, §§ 6, 38, 42, 46, 84, Hughes' Conts.

Cited, §§ 218, 272, 287, Gr. & Rud.

See ORAL EVIDENCE. Cited, §§ 29, 180, 186, 186*a*, 191, 216, 223, 225, 227, 234, Hughes' Proc.

Oral evidence; admissibility of, to affect a writing. See ORAL EVIDENCE; COMMERCIAL PAPER; 43 L. R. A. 449-487; Brown: 54; Jamestown, etc. Ass'n, 172 N. Y. 291, 92 Am. St. 740; cases (strict rule applied to note); Harris, 56 Am. St. 659-672, ext n.; Malpas, 1 L. R. C. P. 336, H. & R.; 1 Chit. 159, 1 Add. Conts. 243; Bro. Max. 835, Laws. Conts. 378; 2 Whart. Ev. 1026; Lindley, 17 C. B. (N. S.) 573 (112 E. C. L. R.), Jones, Construc. Conts. 137 (collateral oral stipulation adding to a contract); Allen v. Pink, 4 M. & W. 140, Jones, Construc. Conts. 132 (oral warranty admitted if writing is informal); Filkins, 24 N. Y. 338; Hersom, 21 N. H. 224.

Evidence; construction; contemporaneous parol (oral) evidence is inadmissible to alter or vary a written contract. But a supplementary contract may be shown. Malpas, Jones, Construc. Conts. 126-141. See Goss; Blackett; Wigglesworth; Harper v. City. A modified or abandoned contract may be shown. Mackenzie, 126 Cal. 591, 77 Am. St. 209, n. Lippincott, 119 Wis. 573; *id.* 635.

Commercial paper from necessity must be in writing, and from this idea it must be certain. Consequently *Expressio unius est exclusio alterius* applies to it with great strictness. Therefore what the note or bill expresses is exclusive, and oral evidence is inadmissible to alter or vary it. The integrity of commercial paper depends on the writing expressing the contract and all of the contract. Any other view would be destructive of the end to be secured and of the philosophy of the negotiable instrument, especially if transferred according to its purpose of creation and design. *Ut res magis valeat quam pereat* is strictly applied for the bill or note, and almost as strictly for a deed. Elwell; Sturdivant: 410. Sealed instrument while it is executory cannot be altered or varied. 56 Am. St. 669-670; *Contra* cases.

53. WOOLLAM v. HEARN (1802), 7 Ves. Jun. 211, 32 Eng. Rep. 86, 2 Lead. Cas. Eq. 920-1040, n.; 2 Page Conts. 1191

Cited, §§ 148, 180, 186, 186*a*, 191, 216, 223, 225, 227, 234, 239, Hughes' Proc.; §§ 272, 287, Gr. & Rud.

Oral evidence inadmissible to alter or vary a writing. Pym; 1 Gr. Ev. 275-305; § 87, Hughes' Conts.

53a. QUEEN'S CASE (THE) (1820), 2 Brod. & Bing. 284-315 (6 E. C. L. R.) 22;

Leading Cases.—53a. Queen's.

1 Gr. Ev. 88, 218; Rul. Cas. 183, 2 Wigm. Ev. 76, 1259-1263.

The contents of a written instrument which is capable of being produced must be proved by the instrument itself and not by oral evidence. The best evidence is required. Iverslie.

Oral admissions out of court are competent evidence to prove a written instrument not produced. Slatterie, 6 M. & W. 664-669, 1 H. & W. 16, 11 Rul. Cas. 208 (deed may be proved by oral admissions).

A document to contradict one, must first be shown him and identified by him. Statutes change this rule.

54. BROWN v. SPOFFORD (1877), 95 U. S. 474 (24 L. ed. 508), (it is competent to show whether one signed as maker, guarantor, or as indorser of a note). *Contemporanea,* etc.; New England Co.; Horner (duration of a lease); 3 Wash. R. P. 348, 404, 408; Blossom, 13 N. Y. 569, 67 Am. Dec. 75, n.; Harper v. Ins. Co.; 1 Beach, Conts. 719-723; Sattler, 160 N. Y. 291, 46 L. R. A. 679: cases.

Indorsement contract cannot be varied. Stack, 74 Ind. 571, 39 Am. Rep. 113-123, n.; 2 Rand. Com. Paper 778, 3 *id.* 1903; Sturdivant; 2 Whart. Ev. 1058-1062.

55. GOSS v. NUGENT (1833), 5 Barn. & Adol. 58 (27 E. C. L. R.), 2 N. & M. 28, Thayer, Cas. Ev. 863, notes; Finch, Cas. 687; Chit., Ans.; Hughes, Pars.; Bish. Conts.; Mech., Benj., Sales; Wh. Ev. 901; 2 Kent, 499; 1 Gr. Ev. 305; Browne, Stat. Frauds, Keener, Sel. Conts., Pars. N. & B., Woollam: 53.

Cited, §§ 24, 186, 227, 228. Hughes' Proc.

Cited, §§ 180, 194, 280, 288, Gr. & Rud.

Where evidence in writing is required, all oral evidence is excluded. Goss. See FRAUDS AND PERJURIES; Harris, 119 N. C. 34, 56 Am. St. 656-672, ext. n.; Peay, 48 S. C. 496, 59 Am. St. 731, n.; New Eng. Dressed Meat Co., *q.v.*; 1 Chit. Conts. 155; Iverslie, 1 Mech. Sales, 472-474, Solomon; O'Donnell, 43 Me. 178, 69 Am. Dec. 54, Huff. & W. Conts. 100.

What ought to be in writing must be proved by writing, is the rule. 205 U. S. 105 (all prior negotiations merge).

56. M'ELMOYLE v. COHEN (1839), 13 Pet. (U. S.) 312, 10 L. ed. 177, 2 Am. Lead. Cas., 597-664, ext. n. *Cited,* § 29, Hughes' Conts.

Cited, §§ 5, 7, 52, 86, 87, 152, 167, Hughes' Proc.; §§ 13, 18, Gr. & Rud.

Full faith and credit shall be given the judicial records of the states. (Art. IV, § 1, Const. U. S.) Mills; Weeks, Att'ys, 204; 1 Gr. Ev. 504-506, 548; Starbuck. Authentication of public records. See AUTHENTICATION.

57. MILLS v. DURYEE (1813), 7 Cranch (U. S.). 481 (3 L. ed. 411, n.), 2 Am. L. C. 597-634; stated in Borden; Andrews; Haddock; Bailey, Jurisdic. 188, 1 Gr. Ev. 503-506, 548; 2 Tucker, Const. 306 (power over public acts, records, etc.)

Cited, §§ 5, 52, 86, 87, 167, Hughes' Proc.

Cited, §§ 13, 18, 268, Gr. & Rud.

Full faith and credit shall be given judicial records in each state. Arrington, 127 N. C. 190, 80 Am. St. 791, 1 Gr. Ev. 503-506; S. P., *M'Elmoyle; Starbuck; Need-*

Leading Cases.—57. Mills.

ham; Borden. Judgments of sister state; how pleaded in debt; actions on. Starbuck; Kunze, 94 Wis. 54, 59 Am. St. 857, n., Weeks, Att'ys, 204, 1 Gr. Ev. 504-506, 548.

Jurisdictional inquiries may be raised to a judgment. Thormann, 176 U. S. 350, 192 U. S. 125, 128 cited Needham, 261.

58. PENNOYER v. NEFF (1877), 95 U. S. 714 (24 L. ed. 565), McClain, Const. Cas. 1032; 69 L. R. A. 674; 203 U. S. 164; 204 U. S. 16; 205 U. S. 149 (*Audi alteram partem*); Windsor: 1; Williamson: 65; Brown, Jurisdic. S. P. in Freeman, 119 U. S. 185; Hinton, 126 N. C. 18, 78 Am. St. 636 (extra-territorial jurisdiction of the states), 34 Or. 524, 75 Am. St. 669: cases; Windsor; Carr v. Brown, *sub,* **Murray's.**

Cited, pp. 11, 41; §§ 8, 20, 24, 27, 51, 52, 57, 73, 104, 105, 137, Hughes' Proc.; §§ 93, 119, 124-128, 132, 201, 203, 214, 267, 268, Gr. & Rud.

Personal service of process essential for an in personam judgment. Pennoyer, 94 Am. Dec. 768; Clark v. Wells (1906), 203 U. S. 164; Haddock; Williamson: 65.

All process is domestic. Ableman. See R. S. U. S. 738; Mercantile, 10 Fed. 604 (process may be sent abroad); 78 Am. St. 636; Lynde, 162 N. Y. 405, 76 Am. St. 332, n.

Service by publication. Pennoyer; Galpin: 63: 65; Stewart, 45 W. Va. 734, 44 L. R. A. 101; Cooper v. Reynolds; Bailey, Jurisdic. 23-56. Haddock.

Affidavit is jurisdictional. Duxbury, 78 Minn. 427, 79 Am. St. 408.

One claiming an adjudication must prove it. Williamson: 65; Windsor v. McVeigh; *Audi;* Clem.

Judgments depending for their validity on an attachment of property. Miller v. White (1899), 46 W. Va. 67, 76 Am. St. 791-805, n.

59. RICKETSON v. RICHARDSON (1864), 26 Cal. 149; Ror. Interstate Law, 178, 40 Am. St. 436, 1 Fost. Fed. Prac. 97, Suth. Stat. 394.

Cited, §§ 70, 81, 104, 105, 109, 112, 186, 190, 243, 321, Hughes' Proc.

Audi alteram partem; jurisdiction; mandatory and directory statutes; service by publication; provisions for must be strictly complied with. Ricketson; Coffin, 22 Nev. 169, 58 Am. St. 738; Galpin: 63; Pennoyer; Guaranty Co., 139 U. S. 187: cases; Beckett, 15 Colo. 281, 22 Am. St. 399, n.; O'Rear, 8 Colo. 608; Strode, 6 Idaho, 67, 96 Am. St. 249-255; cases.

Process, presumption to support. Bank; 148 Calif. 285, 113 Am. St. 285-291.

A strict statutory power or right has every intendment against it, and therefore the rule is that it must affirmatively appear. Jurisdictional facts are not presumed nor supplied by intendment. They must appear. Bloom; Piper; Russell v. Mann; Williams v. Hingham; Williamson v. Berry: cases. Clem. See Harrow.

Record must affirmatively show the facts. Roberts, 3 Colo. Ap. 6; Wap. Attach. 351;

Leading Cases.—59. Ricketson.

McGaherr, 6 Ia. 331, 71 Am. Dec. 421, n.; Strode. See Ell. App. Proc. 717.

Affidavit to authorize publication must be sufficient upon its face and within its own four corners; it cannot be aided; reference to other documents will not aid it. The maxim *Verba relata hoc maxime,* etc., does not apply. Ricketson; Beckett Colo.) *supra;* Van Fleet, Coll. Att. 330.

Probative facts must be stated. Palmer, 13 Mont. 184, 40 Am. St. 434, n.; Frisk, *post.*

Jurisdiction of court; when presumed. Adams, 95 Mo. 501, 6 Am. St.; Hannah; Nixon; Piper; Ransom; Harvey; Dobson: 232*a.* Presumptions from the record. Roosevelt, 108 Wis. 653 (No presumption against the record).

The strictness of the rule in making notice by publication arises from the requirements of constructive notice and to comply with the rule in Ransom; Hahn.

One interested in the proceedings is presumed vigilant and present at each step, but only so long as each step is shown and is sufficient; for the moment it is insufficient, or is not shown, this dismisses such a party *sine die.* The chain for continuity must be present and perfect. This rationale must be mastered. It extends throughout taxation and other proceedings as well. Drew.

May be amended (when there is something to amend by). Frisk, 75 Wis. 479, 17 Am. St. 198, n.; Long, 45 Kan. 271, 23 Am. St. 724.

Newspapers; what are, for publication of notices. Lynch, 101 Mich. 171, 45 Am. St. 404, n.; Lynn, 145 Ind. 584, 57 Am. St. 223, n., 33 L. R. A. 779; Hanscom, 60 Neb. 68, 48 L. R. A. 409.

Publication of notices; generally. Wade, Notice, 1025-1089; Van Fleet, Coll. Att.; Moyer, 2 Ind. Ap. 571, 16 L. R. A. 231-286, ext. n. *Judicial sales; publication of notice of.* Wade, Notice, 1086-1104. *Execution sale; officer liable for failing to give notice. Sub,* Six Carpenters' Case. Knowledge of proceedings not sufficient; notice according to law must be given, and it must appear from the judgment roll. Strode.

60. GARLAND v. DAVIS (1846), 4 How. (U. S.) 131 (11 L. ed. 907).

Cited, §§ 9, 26, 29, 72, 73, 113, 126, 142, 145, 157, 168-170, 173, 180, 186, 186*a,* 217, 241, 251, 304, Hughes' Proc.

Cited, §§ 272, 278, Gr. & Rud.

Garland stated: Action on the case arising from breach of contract. Plea, *non assumpsit.* Trial by jury; finding for plaintiff on the issue, which was on the promise out of which the tort arose, and nothing more (this was immaterial). No objection was made below by the defendant, nor in the assignment of errors, nor otherwise in the supreme court. *Held,* that the court would *sua sponte* take notice that an immaterial issue was involved, and that there was no material issue, and that the verdict shows that

Leading Cases.—60. Garland.

there was nothing material passed upon; that there was no substantial issue, and therefore that the trial was a nullity. Courts *sua sponte* notice error from the mandatory record. Campbell v. Porter: 2; U. S. v. Burnham (1816), 1 Mason, 57; stated, 4 How., p. 143, where the court *sua sponte* took notice of the defect, which was the sole ground of its opinion. S. P., in Patterson v. U. S. (1817), 2 Wheat. 221 (verdict variant from pleadings); Gall, 66 Ill. Ap. 478; Harrison v. Nixon (1835), 9 Pet. 483, 535 (evidence is irrelevant where there are no allegations); Shutte; 4 How. 143; Thomas v. Mackey; *De non apparentibus*, etc.

Allegata et probata must correspond. 4 How. 148, 11 L. ed. 915; Bristow. Irrelevant evidence is incompetent evidence. Shutte; Thomas v. Mackey; *Actore non probante*, etc.; *Frustra probatur*, etc.

The record must be sufficient to support a judgment. Garland; Windsor; Harrison v. Nixon, *supra;* U. S. v. Cruikshank. The above requirement is not a subject of waiver, nor of consent, nor of acquiescence, nor of contract. *Consensus.*

Amendment allowed where immaterial issue was joined. Garland. But not after a hearing upon the merits. Walden.

An answer must be pleaded and also be sufficient. Garland; J'Anson; Skeate; Pom. Rem. 549, 550; Bliss, Pl. 422-424; Cromwell (defenses not pleaded are forever waived).

A bill in equity must be sufficient. Harrison v. Nixon, *supra;* Sto. Pl. 4, 10, 257, 259; Rushton; Windsor; Thomas v. Mackey. A bill is as strictly judged as an indictment; if either fails, then *Debile fundamentum fallit opus* applies.

A verdict must be sufficient. Patterson v. U. S., *supra.*

There are inherent differences in actions *ex delicto* and *ex contractu.* Garland. These cannot be joined. Kewaunee; Brugger.

Record proper controls; and lower court's construction and views are immaterial. Hall, 8 Colo. 103. See THEORY OF THE CASE.

What may be waived in judicial procedure is a leading question and is attended with very important views, and is a phase of contract which we singularly seek to impress. Cases like Garland, Campbell v. Porter and Gentry, will profoundly interest the practitioner. Garland v. Wholebau: 297.

61. SANBORN v. SANBORN (1856), 7 Gray (Mass.) 142. *Cited,* §§ 31, 104. 107, 126, 156, 158, 309, Hughes' Proc.; § 239, Gr. & Rud.

Statutory construction. A court must have jurisdiction of a subject-matter when a suit is commenced; its subsequent presentation or acquisition will not do. *Quod ab initio non valet,* etc.; Buck, 16 Gray 555. A reply cannot by relation confer jurisdiction; until a court acquires jurisdiction of a subject-matter it can make no valid order. Shutte: 291.

Leading Cases.—61. Sanborn.

Proceedings are instituted by filing a statement of claim with the clerk, is a universal rule in all systems. Declaring this "rockribbed and ancient" rule in codes—judicature acts—does not constitute it new law. Indianapolis, etc. R. R.; Fost. Fed. Prac. 465.

How a court may acquire jurisdiction of a subject-matter is mandatory, and cannot be waived. Such requirements are a part of due process of law. Derogation from these requirements attacks the conserving principles of procedure.

A plaintiff must show his right in his pleading to claim that a federal question is involved. Spencer v. Duplan Silk Co., 191 U. S. 526; Boyd; Winona.

62. BOYD v. BLANKMAN (1865), 29 Cal. 19, 87 Am. Dec. 146, n.; Zinn L. C. Trusts, 147.

Cited, §§ 5a, 29, 73, Hughes' Proc.

Cited, §§ 230, 231, Gr. & Rud.

Aider by pleading over is a part of the doctrine of the theory of the case. It is a part of *Consensus tollit errorem.* From many decisions the reader will find ample reason to suppose that there are no defects that cannot be cured by waiver or pleading over. Elsewhere we observe that the code provision—that filing an answer waives all defects except jurisdiction of subject-matter and a sufficient description of a particular matter—has been construed away in several code states. This forbidden construction proceeds upon the theory of pleading over—upon waiver. It proceeds in rude and thoughtless disregard of the conserving principles of procedure, and of the means of their existence. Kewaunee. See COLLATERAL ATTACK.

Aider by pleading over is almost wholly confined to common-law civil cases, and in some code states that have adopted the extreme views of the theory of the case. It is opposed to the rule that the general demurrer searches the whole record and attaches to the first fault; and also the maxim *Quod ab initio non valet intractu temporis non convalescit.*

A bill in equity cannot be aided. Sto. Pl. 10, 257; Belew, 56 Miss. 346; 1 Encyc. Pl. & Pr. 927; 3 *id.* 357, 358; Beach, Eq. Pr. 95-100; Windsor: 1.

From the following decisions the case law on the subject may be judged.

A reply may aid an answer. Gaskins, 115 N. C. 85, 44 Am. St. 439, 25 L. A. 813. *Contra:* Webb v. Bidwell (1870), 15 Minn. 479, 485; Wyatt: 31 Oreg. 48, 2 Cyc. 691. See REPLY.

Answer may supply essential facts. Ogden, 60 Ark. 70, 46 Am. St. 151, Pom. Rem. 579: cases, 4 Encyc. Pl. & Pr. 608.

A plea may be aided by a replication. Deitsch, 1 Colo. 299, 306. But proofs cannot aid. Deitsch; Thomas v. Mackey (Colo.).

Taking leave to plead after demurrer is

Leading Cases.—62. Boyd.

waiver of formal and dilatory defects. Stanberry, 6 Colo. 28. And may operate far beyond that. Hume. Substantial defects may be cured by answer or by proofs. Fairbanks, 8 Colo. App. 190.

A complaint may be aided by a reply. Johnson, 12 Colo. Ap. 17.

The foundations for a judgment may be found in the statutory record. Holman, 8 Colo. Ap. 285, 286; Hume. *Contra:* Jansen, 8 Colo. Ap. 38, 40 (complaint must be sufficient); Robinson: 1/ (stricter than Rushton); Bliss, Pl. 417.

Facts conferring jurisdiction upon federal courts must affirmatively appear. Craswell; Cruikshank. Subsequent pleadings will not supply such facts. Consolidated, etc. Co. v. Turck (1893), 150 U. S. 138; Devine v. Los Angeles.

Admissions in an answer will not operate to aid. 3 Encyc. Pl. & Pr. 358. *Denials will aid.* Pom. 579. Conclusions of law cannot be aided, is the general rule.

A cause of action cannot be brought forward by a reply. A reply will not aid a complaint. 177 U. S. 78. REPLY; Pom. Rem. 579; Spencer v. Duplan, *sub,* Sanborn: 61; Windsor: 1.

Compelling one to plead facts the adverse side should plead and prove, need not be proved by one so forced to plead them. Bliss, Pl. 417. Orders of court cannot override general laws. Ransom: 122.

A trustee cannot deal with the trust estate. Boyd; Otis, 107 Mich. 312, 2 Am. & Eng. Eq. Cas. 284-294, ext. n.; Keech.

63. GALPIN v. PAGE (1874), 3 Sawyer, 93-128, 3 So. Law Rev. 713, 1 Am. Law Times Rep. (N. S.) 523, 1 Cent. Law Jour. 491, Fed. Cas. No. 5206 (service by publication).

Cited, §§ 91, 93, 115, 119, 124, 125, 152, 157, 159, 214, 241, Gr. & Rud.

Presumptions in favor of judgments. Galpin; Ferguson: 264; Hahn (liberal rule).

Service of process by publication; history.

"According to the due course of the common law"; meaning S. v. Baughman: 268.

Infants: service of process on. Galpin; Westmeyer v. Gallencamp (1900), 154 Mo. 28, 77 Am. St. 747, n. (*Expressio unius,* etc., cannot waive a summons).

64. GALPIN v. PAGE (1873), 18 Wall. (U. S.) 350, 21 L. ed. 959 (3 Sawyer, 93-128), stated, 34 Oreg. 527, 75 Am. St. 761, 2 Tucker: Const. 306; Kempe's Lessee; Crepps; Ransom; *Omnia præsumuntur rite,* etc.

Judgments depending for their validity on an attachment. Note, 76 Am. St. 800-805; Drake, Attach. 101. Probate proceedings; presumption of regularity. Note, 81 Am. St. 535-562.

Statutory powers must be strictly pursued. Hastings, 39 Cal. 137; Nelson: 129; Kempe's: 115; Walker: 118; Piper: 114.

The mandatory record must show statutory powers were strictly pursued. Galpin; Blair; Hannah; 2 Cool. Tax. 926; Iverslie: 46. Due process of law requirements. 204 U. S. 16, 17.

Leading Cases.—

65. WILLIAMSON v. BERRY (1850), 8 How. 495. Quoted and followed: Guaranty Trust Co., 139 U. S. 137, 147: cases; cited, Ror. Jud. Sales, Bisph. Eq., Sto. Eq., Herm. Ex. q. v., 2 Freem. Ex., 204 U. S. 16.

Cited, §§ 8, 12. Hughes' Proc.; §§ 124, 128, 200, Gr. & Rud.

Judicial sales; constructive notice; confirmation necessary. A sale ordered, decreed or permitted by a chancellor, subject to the approval of a master, requires the master's approval and confirmation by the court before the purchaser can have a legal title to the estate that he means to buy or has bid for under the decree of the court. Benton; Clark v. Sires.

Whatever notice is required for proceedings must be given, and it must appear of record. Nixon; Ricketson; Ransom; Iverslie. See Grogan.

A judgment of the supreme court of the United States or of any court may be inquired into, and he who claims the benefit of any proceeding must show that it can be justified in law. Voorhees; Ransom; *Audi;* Horan, stating Williamson, 58 Am. Dec. 147, 6 How. 540; Windsor; Guaranty Trust Co. distinguishing Cooper v. Reynolds; citing Webster v. Reid, quoted in Windsor, therein is found:

"The case of Cooper was one where property was seized by virtue of an attachment taken out at the commencement of the suit in which the proceedings to call in the non-resident defendant were had, and the record asserted that 'publication had been made according to law.' Indeed, Mr. Justice Miller said in that case, p. 319: 'We do not deny that there are cases . . . in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction.' It was said by Mr. Justice Wayne, in Williamson in reply to an argument that a decree in chancery could not be looked into in a collateral way, that 'it is an equally well-settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law.' The decisions of this court upon this subject, beginning in the year 1794 with the case of *The Betsey,* 3 Dall. 6, have been uniform and consistent. The following are a few of the leading cases upon this subject: Rose v. Himely, 4 Cranch, 241; Elliott v. Peirsol, 1 Pet. 328; Wilcox v. Jackson, 13 Pet. 498; Shriver's Lessee v. Lynn, 2 How. 43; Lessee of Hickey v. Stewart, 3 How. 750; Webster v. Reid, 11 How. 437. In the last case it was held that where jurisdiction had been sought to be obtained by publication, as in this case, it was necessary to show that notice had been given by publication as the act required. 'If jurisdiction,' says the court, 'could be exercised under the act, it was essential to show that all its requisites

Leading Cases.—65. Williamson.

had been substantially observed. It was necessary for the plaintiff to prove notice, and negative proof that the notice was not given, under such circumstances, could not be rejected.' In Hunt v. Wickliffe, 2 Pet. 201, an order was made by a state court of chancery for a non-resident to appear, and that a copy be published 'for eight weeks in succession agreeably to law,' and it was held that, as the laws of Kentucky only authorized their courts of chancery to make decrees against absent defendants on the publication of an order for two months successively, the order of the court of chancery for a publication for eight weeks was not a compliance with the law, the supreme court of Kentucky having decided that the publication must be continued for two calendar months. Under this construction of the act, the decree was made against persons who were not parties to the suit, and it was held that it could not affect them. So in Galpin v. Page, 18 Wall 350: 64, it was held that when by legislation of a state constructive service of process by publication is substituted in place of personal service, the statutory provision must be strictly pursued in order to bind a citizen of another state not personally served. 'Whenever,' says Mr. Justice Field, 'it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. . . . When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, . . . every principle of justice exacts a strict and literal compliance with the statutory provisions' (pp. 378, 369). Later cases to the same effect are Earle v. McVeigh, 91 U. S. 503; Settlemier v. Sullivan, 97 U. S. 444; Cheely v. Clayton, 110 U. S. 701; Applegate, 117 U. S. 255. And there is scarcely a state in the Union in which the same principle has not been announced and re-affirmed." 139 U. S. 146-148; Ricketson.

Infants; equitable jurisdiction over. Williamson v. Berry; Bishp. Eq. 541-555; 2 Sto. Eq. 1327-1361.

Judicial sales generally; outline citation. Ror. Jud. Sales; Freem. Void Jud. Sales; Van Fleet, Coll. Att. 781-791. When set aside. Schroeder, 161 U. S. 334 (40 L. ed. 721, n.). CONSTRUCTIVE NOTICE FROM RECORDS.

66. OAKLEY v. ASPINWALL (1851), 4 N. Y. 514, 525, End. Stat. 348, 428, 430. See Oakley v. Aspinwall: 222 (no one can judge his own cause).

Cited, pp. 32. 33; §§ 5, 5*b*, 7, 9, 11, 17, 28, 51, 62, Hughes' Proc.; §§ 137, 197, Gr. & Rud.

Notice essential and is implied; judicial power cannot be exercised without. This involves the obligation of government. Windsor; Bloom; Borden; Starbuck; Ferguson. *Audi alteram partem:* Max. No. 1, §§ 51-77, Hughes' Proc.

Leading Cases.—

67. WEAVER v. TONEY (1900), 107 Ky. 419, 21 Ky. L. R. 1157, 54 S. W. 732, 50 L. R. A. 105. *Cited,* §§ 51, 57, 87.

Audi alteram partem. Where notice might or could have been given it must be given before extraordinary orders are given. Ransom. An opportunity to be heard is an essential in due process of law. Murray; Windsor: 1.

Irreparable injury that may result from the delay requisite to the giving of notice for an injunction will not be sufficient to justify the failure to give notice when there is no excuse for not filing the suit earlier, when there was time to give the notice. *Nullus commodum capere,* etc.; 1 Beach. Inj. 124, 125; Lee v. Haley, *sub,* Seabury.

Prohibition and injunctions mandatory and other orders are void, if obtained without notice. It is no contempt to disregard them. Arbitrary edicts are entitled to no respect. P. v. Barrett (1903), 203 Ill. 97, 96 Am. St. 742, n. (*Habeas corpus* will relieve).

Political rights cannot be protected by courts, as a general rule. See CONSTITUTIONAL LAW.

Judges cannot contract for nor assume and exercise a lawful jurisdiction not given by law; and if they do their proceedings are void. Abuse of fundamental rights divests jurisdiction *pendente lite.* Weaver; Hendman v. Toney (1895), 97 Ky. 413; Windsor. Judges cannot choose their cases. Cohens. Nor override the law with their orders. Ransom; Horan; Munday; Williamson v. Berry: 65; Lange: 159.

Usurpation and abuse of power vitiates all official action in a constitutionalism. Courts cannot make a record that will bar or foreclose inquiry after their jurisdiction.

68. MOORE v. MAURIERRE (1879), 101 U. S. 417, 25 L. ed. 1052 (in full). § 186, Hughes' Proc.

Due process of law; sale of decedent's lands; notice of sale is directory, and failure to give does not invalidate it. Astor v. Grignon's Heirs, 2 How. 319 Harvey: 23; Brown Jurisdic. *Contra,* Young, 145 Mo. 250, 68 Am. St. 568, n. See Thatcher; Bailey, Jurisdic. 174-187; Wilson, 66 Cal. 243; Wakefield, 20 Me. 393, 37 Am. Dec. 60-66, Van Fleet, Coll. Att. 333; Bloom. COLLATERAL ATTACK; LIMITATIONS; Bradley, 187 Ill. 175, 79 Am. St. 214. See *Audi alteram partem.*

69. U. S. v. PEREZ (1824), 9 Wheat. (U. S.) 579 (6 L. ed. 165, n.), 1 Lead. Crim. Cas. 461-482, n.: 291, 48 Am. St. 206: cited, 1 Bish. C. L. 1018, 1033, 1041, 2 Crim. Def. 915, 2 Van Fleet, For. Adj. 649-652, 2 Tucker, Const. 331.

Cited, §§ 6, 19, 130, 133, 136, 141-145, Hughes' Proc.; §§ 152, 294, Gr. & Rud.

Lange, Ex parte (1873), 18 Wall. 163, 205 (21 L. ed. 872, n.), Roberts v. S. (1853), 14 Ga. 8, 50 Am. Dec. 528-549, ext. n.

Disagreement of jury no jeopardy. Perez;

Leading Cases.—69. Perez.

Thompson v. U. S. (1894), 155 U. S. 271.

Former jeopardy; when it attaches; "Due process of law." A crime must be charged upon the record before a constitutional court. R. v. Vaux; R. v. Vandercomb; Munday: 79; Moore v. C.: 21; S. v. Thurstin. *Nemo debet bis vexari; Audi alteram partem; Consensus tollit errorem.*

New trial in criminal case; jeopardy; whether it attaches. C. v. Arnold (1884), 83 Ky. 1, 4 Am. St. 114, ext. n.; C. v. Green; Simmons v. U. S. (1890), 142 U. S. 148, 154, 12; Windsor v. R., L. R. 1 Q. B. 289, 390, 6 Best & S. 143 (118 E. C. L. R.), and 7 Best & S. 490: stated, Van Fleet, For. Adj. 652; Campbell v. S. (1836), 3 Yerg. (Tenn.) 333, 1 Lead. Crim. Cas. (B. & H) 592-599, n., 30 Am. Dec. 417. Cited, Bish. C. L. 994, 1004; Frond v. U. S., 199 U. S. 521-540 (new trial recommits prisoner to retrial on all counts; *contra,* cases).

Practice procedure; plea of. C. v. Fitzpatrick (1888), 121 Pa. 109, 1 L. R. A. 451, n., 6 Am. St. 757, Whart. Cr. Pl. & Pr. 435-520; Clark, Cr. Proc., pp. 382-407; 1 Bish. Cr. Proc. 808-817; 9 Encyc. Pl. & Pr. 630-641 (plea of).

Indictment must be certain for plea of. 8 Colo. 373. Consequently pleadings must be certain. See also Campbell v. Porter; also for constructive notice and collateral attack. IDENTIFICATION.

Tests: rules for determining when there has been a jeopardy. 2 Van Fleet, For. Adj. 633-660. 1 Bish. C. L. 1012-1047; Weaver v. S. (1882), 83 Ind. 542; 4 Crim. Law. Mag. 27-36, n., P. v. Ny Sam Chung (1892), 94 Cal. 304, 28 Am. St. 129, n.; McDonald v. S. (1891), 79 Wis. 651, 24 Am. St. 740, n.; S. v. McKee (1830), 1 Bailey, Law (S. C.), 751, 21 Am. Dec. 499-508, ext. n.

Once in jeopardy. 4 Crim. Law Mag. 487-508, 17 Am. Law Rev. 735; note, 58 Am. Dec. 537, 2 Kent, 12: cases; Coleman, 97 U. S. 509.

Defense of former jeopardy. 11 Crim. Law Mag. 325-345, Secgk. Stat. Law, 572, 573. Must be pleaded. 1 Bish. Crim. Proc. 808, 814. Constitutions sometimes affect the question as to second trials; when; S. v. Anderson (1886), 89 Mo. 312.

Contempt and indictment for same act are not inconsistent; they concurrently lie. Re Chapman (1887), 166 U. S. 661, 1 Bish. C. L. 1067.

70. R. v. WAVERTON (1851), 17 A. & E. (N. S.) 562 (79 E. C. L. R.), 1 Den. C. C. 365, 2 Lead. Crim. Cas. 152-163, n., 8 Law & Eq. Rep. 344. *Cited,* §§ 38, 216, 237, 248, 277, 286, Hughes' Proc.

Due process of law; presence of essential allegations in the right record indispensable.

R. v. W.; Cruikshank: Huntsman; Wheatley; Moore v. C.; R. v. Waters; Munday: 79; Borkenhagen; Rushton; *Audi,* etc., *sub,* Kingston's Case; J'Anson; Dovaston; DUE PROCESS OF LAW.

Material allegations must be present; they cannot be waived. R. v. Waverton; *Bristow:* 135. *Frustra probatur,* etc. 1 Chit. Pl. 244 (236). And likewise in civil cases, *Id.*

Also in equity. 1 Beach, Eq. Pr. 95, 99, 100; Sto. Pl., 10.

The word "said" incorporates in a count a previous description in a preceding count. R. v. Waverton; Blitz, R. v. Waters; Moore v. C.; 5 Encyc. Pl. & Pr. 320; 1 Bish. Cr. Proc. 431. *Verba relata hoc maxime,* etc.

Jurisdiction depends on essential pleadings and mandatory record matter. Windsor.

Leading Cases.—70. Waverton.

71. R. v. WATERS (1848), 1 Den. C. C. 356, Temp. & M. 57, 2 Car. & Kir. 886, 2 L. C. Cas., B. & U., 152, n.; *cited,* Bish. C. L.

Cited, §§ 38, 216, 237, 248, 276, 277, 281, 286, Hughes' Proc.

R. v. Waters stated: The prisoner was charged in the first count:

"That she, in and upon a certain infant female child, born of the body of her, the said S. W., and of tender age, to wit, of about the age of two days, and not named, feloniously made an assault, etc., and caused to take poison, and so murdered her."

In the second count:

"That the said S. W., in and upon the same infant female child so born of the body of her, the said S. W., and not named, as aforesaid, etc., feloniously did make an assault, and that she, the said S. W., the said infant female child in and upon a heap of ashes, etc., wilfully, etc., did cast, etc., and did then and there leave the said infant female child, etc., in the open air, etc., exposed to the cold air, etc., of which said exposure and of the chilling thereby caused, the said infant female child then and there died," etc. *Held:*

1st. That there is a difference between an indictment which is bad for charging an act, which, as laid, is no crime. Cruikshank; Moore v. C.; R. v. Vaux; R. v. Wheatley, and an indictment which is bad for charging a crime defectively. The latter may be aided by verdict, the former cannot. Dobson; 1 Chit. Pl. 103-707; *Ut res magis,* etc.

2d. That the words "said infant female child so born of the body of her, the said S. W.," did not incorporate by reference the description of the child given in the first count, namely, that it was of tender age.

See Blitz v. U. S., which holds, to avoid prolixity, one count may refer to another. Consolidated Coal Co., 163 Ill. 393; Ramsay, 8 Wyo. 476, 80 Am. St. 948, 952.

3d. That the second count was, therefore, defective, in not showing that the child was unable to take care of itself.

4th. That had the act of the prisoner charged in that count been a non-feasance, the indictment would have been bad after verdict.

5th. That it was a misfeasance, and the death of the child was alleged to have been caused thereby, the defective state-

Leading Cases.—71. Waters.

ment in the indictment must be taken to be supplied by the verdict.

Limits of liberal construction. Rushton; R. v. Goldsmith: 20; Harvey v. B.; Dobson; Dovaston; J'Anson; Moore v. C.

Pleadings; aider by verdict. Aider by verdict cures defective allegations, but not absence of allegations. R. v. Waters; 4 Encyc. Pl. & Pr. 608, 610, 662, 743; Rushton; R. v. Bradlaugh; Moore v. C.; Voorhees v. Bank; Munday; Boyd; Borkenhagen; R. v. Waverton; *Audi,* etc.; stated under WAIVER. See *Verba relata.* Hines, 57 Me. 324, 99 Am. Dec. 772.

Codes require that the facts must be stated with precision and certainty. 4 Encyc. Pl. & Pr. 600, 610; Green: 90; 2 Gr. Ev. 7, 3 *id.* 10. If the pleader fails, it is his own fault, and *Volenti,* etc., applies. *Verba fortius,* etc. Bristow: 135.

Verdict cures absence of allegations in attachment affidavit. Leppel, 2 Colo. Ct. Ap. 390; Rice v. Hauptman, *id.* 566; Ell. App. Proc. 717. See Drake, Attach. 86-110. Ricketson; Pennoyer; *Cessante ratione,* etc.

Each cause of action must be perfect in itself. R. v. Waters; Bell v. Brown; 4 Encyc. Pl. & Pr. 619, 620, 623. And the court will not aid the count objected to by looking at another. 5 Encyc. Pl. & Pr. 320. (*Contra* cases note, *id.*) *Verba relata hoc maxime,* etc. And this is the rule on demurrer. 6 Encyc. Pl. & Pr. 298, 299. One has the right to a certain and definite pleading, that he may intelligently demur to it. *Id.* 299; J'Anson; Moore v. C.; Haskel: 101. §§ 84-123, Gr. & Rud. IDENTIFICATION.

A court may compel *separate* statements. 4 Encyc. Pl. & Pr. 623.

One cause of action (count) cannot include another by reference, nor any part of it. And. Steph. Pl. 322; *Verba relata;* 4 Encyc. Pl. & Pr. 619-623. But after judgment it is generally good, aided by verdict or judgment. Waverton. Defective allegations cured by verdict. Norton v. S. (1894), 72 Miss. 128, 48 Am. St. 538, n. Dobson: 232*a. Is good though the incorporated one is bad.* Crain v. U. S.

Every plea must stand or fall by itself. Grills, Willes, 378: cited. And. Steph. Pl. 322; 1 Chit. Pl. 589; Potter, 45 Ind. 416: stated, 1 Chit. Pl. 589.

The rule appears less strict in criminal cases. Blitz v. U. S., *supra:* cases; 1 Chit. Crim. Law, 250; Redman v. S. (1826), 1 Blackf. (Ind.) 429.

Aider by verdict; defect cured by verdict. Note, 13 Fed. 654: cases; Rushton; 1 Chit. Pl. 703-707 (waiver); Dobson.

Aider by verdict; illustration. Indictment that:

"defendant and others unlawfully and wickedly did conspire and agree together, contrary to the provisions of the Debtor's Act, 1869, and within four months next before the presentation of a bankruptcy petition against defendant, fraudulently to remove part of the property of defendant to the value of £10, that is to say (enumerating divers articles), defendant then being a trader and liable to become a bankrupt."

To this there was a plea of not guilty, and a verdict of guilty and judgment. Error was brought on the ground that there was no allegation that defendant was ever adjudged bankrupt.

Held, the fact of defendant having been adjudged a bankrupt was not necessary to complete the offense of conspiracy. It was complete if the person charged had agreed to remove the goods in contemplation of an adjudication being obtained, and that this, though not expressly alleged, must be taken, after verdict, to have been proved before the jury, and that the defect was therefore cured by verdict. Heymann v. R. (1873), 8 Q. B. 102-106, 12 Cox C. C. 383, 8 Rul. Cas. 126-137. See Dovaston. R. v. Goldsmith: 20; cases. Dobson.

Waiver cannot supply absence of allegations. Bro. Max. 136, 137; Rushton; Pom. Rem. 549, 596, 597: cases; Borkenhagen: 81; 1 Chit. Pl. 703-707; *Consensus,* etc.; Van Leuven v. Lyke (waiver); Dobson: 232.

Substance or its absence may be objected to at any time. Hitchcock: 12; Lough: 293. *Consensus,* etc., *Frustra probatur.*

The rationale of waiver, as here applied, is similarly applied in Lough. "He who does not speak when he ought, shall not be heard when he desires to speak." Bro. Max. 138. All that can be found waived will be when one has failed to speak. Lough.

Every material fact must be averred. Waverton; Cruikshank; Moore.

There is no distinction between civil and criminal pleadings as to defective allegations which are aided by verdict, at common law. 1 Gr. Ev. 65. Procedure, pleadings are no more technical in criminal than in Civil Cases. Bristow: 135; Dovaston: 217.

72. R. v. VAUX (Vaux's Case) (1590), 4 Coke, 44, 3 Inst. 314, 1 Lead. C. C. (B. & H.) 513-516, n.: cited, Bish. C. L., *id.* 3 Gr. Ev. 35-37, 36 L. R. A. 181.

Cited, §§ 19, 62, 120, 130, 133, 141, 145, Hughes' Proc.; §§ 152, 294, Gr. & Rud.

A sufficient indictment is essential for former jeopardy. Vaux; Vandercomb; Perez; 2 Van Fleet, For. Adj., § 542.

A record must be pleaded and be sufficient. Id. And this rationale is the same in all cases, either civil or criminal. 1 Gr. Ev. 63, 2 *id.* 7, 3 *id.* 10, 2 Bish. Crim. Proc. 814, 815; Wright v. Griffey; Lea; S. v. Beach: 28, 30, 258, citing Vaux.

Statutes cannot abolish essential certainty. Sub, Waters; Huntsman; Moore.

There can be no trial without an issue. Munday: 79; cases, 79-83; Kingston's Case; *Consensus,* etc.; 1 Gr. Ev. 63, 65, 2 *id.* 7, 3 *id.* 10.

Former jeopardy. Perez; *Nemo debet bis vexari.* Vaux; 1 Bish. C. L. 978-1070*a;*

Leading Cases.—72. R. v. Vaux.

3 Gr. Ev. 35-37. See Hummer; Campbell v. S. (1836), 9 Yerger, 333, 1 Lead. Crim. Cas. (B. & H.) 592-599, n., 30 Am. Dec. 413: cited, Bish. C. L.; *Audi alteram partem;* DUE PROCESS OF LAW; R. v. O'Brien; R. v. Miles; art. 5, Amendment Const. U. S.

The prosecution can have no further proceedings after a verdict of acquittal. P. v. Corning; C. v. Cummings; Perez; S. v. Croteau: 271.

Writs of error will not lie in behalf of the prosecution. P. v. Corning; C. v. Cummings; S. v. Salomons (1834), 6 Yerger, 360, 27 Am. Dec. 469-480.

73. R. v. VANDERCOMB (1796), 2 Leach 708, 2 East. P. C. 247, 514, 517, 1 Lead. Crim. Cas. (B. & H.) 519-542, ext. n.; Cited, 1 Bish. C. L. 793, 796, 1053, 1062, Bro. Max., 347, Wells, *Res. Adj.*, § 414, 1 Wh. Ev. 782; 3 Gr. Ev. 36, 2 Van Fleet, For. Adj. § 682. Cited, §§ 120, 130, 133, 141, 142, 145, Hughes' Proc.

Allegata et probata must correspond. Bristow; Cornfoot. A crime must be charged. Moore. And the record must present it. *Sub,* Moore. This cannot be waived. *Consensus tollit errorem; De non apparentibus,* etc. *Frustra probatur,* etc., *Verba fortius,* etc. Only errors to be preserved and shown in a bill of exceptions can be waived. *Consensus.* 2 *Van Fleet, For.* Adj. 632.

Due process of law; former jeopardy. Regular allegations and a *coram judice* are essential. Vaux; Perez. See DUE PROCESS OF LAW.

The indictment must present a crime. Note, R. v. Vandercomb, 1 Lead. Crim. Cas. 530, 2d ed., 3 Gr. Ev. 10; Lea: 30; Wheatley; Munday. *Different counts;* conviction upon a lesser acquits of greater. Note, 1 Lead. Crim. Cas. (B. & H.).

74. C. v. ROBY (1832), 12 Pick. (Mass.) 496: stated, 2 Van Fleet, For. Adj. 608, 623: cited, 1 Bish. C. L. 787, 788, 804-809, 812, 916, 1003, 1059; 3 Gr. Ev. 33, 36; P. v. McDaniels (1902), 137 Cal. 192, 69 Pac. 1006, 92 Am. St. 81-159, ext. n., 59 L. R. A. 578; S. v. Caddy (1901), 15 S. Dak. 167, 87 N. W. 927, 91 Am. St. 666, n. (offenses must be the same). Burton; Guedel.

Cited, §§ 120, 136, Hughes' Proc.

Cited, §§ 91, 118, 119, Gr. & Rud.

Roby stated: Former jeopardy. A conviction upon an indictment for an assault with intent to murder cannot be pleaded in bar to an indictment for murder, if the offenses are distinct in their legal character, and in no case can a party on trial be convicted of the other. R. v. Miles; R. v. O'Brien; R. v. Wheatley; R. v. Morris (1867), L. R. 1 Cr. Cas. 90, 10 Cox, C. C. 480; Winn, 82 Wis. 57.

Important observations. From such cases as *Waters, Perez, Vaux, Vandercomb, Roby, Cromwell* and those mentioned under *Debile fundamentum fallit opus, De non apparentibus,* etc., *Dovaston* and *J'Anson* may be discovered dominant initials above the fog and cloud of great and

Leading Cases.—74. C. v. Roby.

extended discussions. This bewilderment must prove the graveyard of all who are unable to grasp the rationale which stands for so much, and safeguards and lights the way.

A lasting and useful structure must be drawn from and be founded upon sound initials. As it is with the Parthenon so it is with Jurisprudence. It must include, and be in right harmony and symmetry with the conserving principles (§§ 83-123, Gr. & Rud.) of protection. These must be understood by the practitioner before he can properly advise a court. *Multitudo imperitorum perdit curiam:* A multitude of ignorant practitioners destroys a court. Legal education and its usefulness depends upon its comprehension with those policies, and respect therefor. They must ever be kept in view. From them will appear the importance of Wheatley, Rushton, Moore, Cruikshank, Cooke v. Oxley, Waters, Dovaston, Cornfoot, Bristow, J'Anson and Horan: 85. From these will appear at least one reason why there must be pleadings; and another will appear from Campbell v. Porter; and yet another from notes to Lampleigh and Windsor, and still another from Cromwell. And still there are others (J'Anson v. Stuart). See IDENTIFICATION. All pleadings must be certain to charge either a civil or a criminal wrong. Burton v. U. S., 1 Gr. Ev. 65; §§ 17-22, 27*a*, Hughes' Conts. See INTRODUCTION; §§ 8-12, Hughes' Proc.; §§ 83-123, Gr. & Rud.

Imbedded in the above facts is discoverable the unity, the entirety and the philosophy of the law, and from a grasp of these facts, let us add, its simplicity. A comprehension of these facts will enable the reader to estimate the mischiefs poured out upon any jurisdiction by courts misunderstanding that rationale, upon which depends a certain and definite theory of administering the law—of settling and protecting all rights—and the highest obligations of the supreme power of the state. Lange: 159.

From such a view may appear why pleadings and the mandatory record are constitutional implications. For upon these the greatest constitutional rights depend, and these rights depend upon their incidents. *Expressio eorum,* etc. M'Culloch: 147. DUE PROCESS OF LAW.

Thus may be seen the keystone of the arch, and also its everlasting foundations — Construction — Procedure. *Concordare leges,* etc. §§ 83-123.

Prosecution for a misdemeanor, subsequently developing into a felony, as where one wounded dies from a felonious assault, then the latter may also be prosecuted. C. v. Roby; S. v. Littlefield (1880), 70 Me. 452, 35 Am. Rep. 335-345, ext. n.; 2 Van Fleet, For. Adj. 608; cases; R. v. Morris. Prosecution for assault and battery excuses from assault with intent

Leading Cases.—74. C. v. Roby.

to kill. P. v. Pearl (1889), 76 Mich. 207, 15 Am. St. 304, n.

Merger of crimes. White v. Fort; R. v. Westbeer. Bendernagle (splitting causes of action). Upon an indictment for a felony a prisoner cannot be convicted of a misdemeanor; misdemeanors do not merge into felonies. *Nemo debet bis vexari*, etc.; *Omne majus continet;* S. v. Littlefield.

Autrefois acquit and *convict.* U. S. v. Perez; R. v. Vandercomb. Only one felony can be prosecuted out of one transaction. Gunter v. S. (1895), 111 Ala. 23, 56 Am. St. 17, n.; Bendernagle.

74a. GUEDEL v. P. (1867), 43 Ill. 226; cited, §§ 56, 91, Gr. & Rud. S. P. C. v. Roby; R. v. Vandercomb.

Guedel stated: G. was indicted for slaying Z. by *clubbing him* to death with a gun. To this G. pleaded autrefois acquit (former jeopardy), and therefore set forth a copy of the first indictment, which "averred the killing to have been done *by shooting with a gun.*" To this plea a replication was filed admitting that it was the same transaction, but that the second indictment charges a different felony. To this replication G. demurred unsuccessfully and was also found guilty. He filed no statutory record but presented the mandatory record only for review. The question was, did the second indictment present a different felony. Held, it did, and that the plea was no bar.

The court cited and followed, 1 Gr. Ev. 65, 3 *id.* 10; R. v. Kelly, 1 Moody C. C. 113; R. v. Hughes, 5 C. & P. 126; R. v. Pedly, 1 Leach, 242; C. v. Roby; R. v. Vandercomb.

The court observed that the law requiring certainty of averment "has its origin in that tenderness of the law for human life, which requires that a prisoner on trial for murder shall be fully informed by the indictment of the precise nature of the charge he is called to meet." The origin of this requirement is different in equity. Sto. Pl. 10, 240-252; Lang v. Metzger, 206 Ill. 475, 478; Wabash: 137 (Ill.); 1 Gr. Ev. 65; U. S. v. Cruikshank: 232.

The true origin of the rule is discoverable from the conserving principles of procedure. Frustra probatur quod probatum non relevat. It involves not only the accused, but the trial court, the Supreme Court, and the whole public as well.

Allegata et probata must correspond. Bristow v. Wright: 135.

Variances are fatal. Humpeler v. P., 92 Ill. 400; Bromley v. P., 150 Ill. 297; Limouze v. P., 58 Ill. Ap. 314 (a false pretence relating to parcels or lots of land is not sustained by proof as to one lot only).

Different offences may arise from the same act. C. v. Roby: 69.

The conserving principles of procedure are ably vindicated by many cases. Wabash R. R. v. Friedman; Bates. These override the tenderness of the law for accused persons. Austin R. R.; Planing Mill Co.; *In præsentia majoris cessat potentia minoris.*

The mandatory requirements of a constitutionalism cannot be waived is a ground

Leading Cases.—74a. Guedel.

and rudiment of law. § 56, Gr. & Rud. Campbell v. G.

A cause may be reviewed upon the mandatory record alone. Windsor; 2 Cyc. 715; Roden.

The ground of the general demurrer is never waived. Slacum; McAllister; Benton.

A plea of *res adjudicata* must be pleaded even in a criminal case, and as in *Guedel.* Bish. Crim. Proc. 814, 815; 3 Gr. Ev. 36. See *Res Adjudicata.*

A fortiori it ought to be pleaded in a civil case and as a like abatement matter. *Cf.* Chicago v. Babcock, 143 Ill. 358.

It is sufficient if the substance of the issue be proved. 1 Gr. Ev. 59.

75. R. v. O'BRIEN (1882), 15 Cox, C. C. 29, 46 L. T. 177.

O'Brien stated: Autrefois acquit; former jeopardy. Nemo debet bis vexari, etc. It is a rule of law that a man shall not be twice vexed for one and the same cause. On an indictment for receiving stolen property at common law, defendants were acquitted on the ground that the property was a fixture. Afterwards they were indicted under a statute for stealing a fixture. *Held,* the acquittal for receiving stolen property was no bar to the second prosecution.

It is a clear principle of English law that a person cannot be indicted for a crime of which he has already been acquitted. Vaux; Perez, Gr. & Rud.

"One charged with the murder of a girl, whose miscarriage he had sought to procure, and who, after the operation, died, and who is found not guilty upon the indictment for murder, may still be tried and convicted of an attempt to procure abortion."

Assault with intent to commit murder. Prosecution for this is no defense to prosecution for murder, where the assaulted person subsequently dies from the wounds inflicted at the time of the assault. C. v. Roby, citing S. v. Littlefield; Johnson v. S. (1885), 19 Tex. Ct. App. 453, 53 Am. Rep. 385; note, 58 Am. Dec. 541-546. *Omne majus continet in se minus* (the greater contains the less). Bro. Max. 174. Other cases on this subject are: R. v. Sheen (1827), 2 C. & P. 634 (12 E. C. L. R.); R. v. Vandercomb; Guedel.

76. KINGSTON'S CASE (generally cited as Duchess of Kingston's Case) (1776), 20 How. St. Tri. 355-652, 1 Leach, C. C. 146, 2 Sm. L. C. 734-986, ext. n., 8th ed., 731-865, 11th ed. (with Doe v. Oliver, reviewing English cases); Rood, Garn. 109 (effect of judgments) (stating Kingston's Case); Bul. N. P. 224, 1 East, P. C. 468, 1 Van Fleet, For. Adj., pp. 1-77, 6 Mews' E. C. L., 398, 415: cited, Bro. Max., Hibshman v. Dulleban (1835), 4 Watts, 182; The Duchess, etc.; Brown, Jurisdic., 1 Freem. Judg. 284 (most widely cited case in the world).

Cited, §§ 4, 16, 29, 120, 122, 128; stated, 129, 130, 131*a*, 182, 184, 334, Hughes' Proc.; §§ 14, 20, 52, 91, 171-174, 179, 200, 223, 258, Gr. & Rud.

Conflict and development of its rules. See works on *Res adjudicata,* Estoppel, and kindred subjects.

Leading Cases.—76. Kingston's.

Res adjudicata rules are stated in notes, 2 Sm. L. C.; 1 Herm. Estop. 20. See Cromwell; Mondel; Bailey, 1 Gr. Ev. 63, 528; 2 *id.* 7; 3 *id.* 10; Bro. Max. 327: *Interest reipublicæ*, etc.; *Salus populi suprema lex.* C. v. Roby: 74.

Fraud vitiates an adjudication. Bro. Max. 329, n., 342; S. v. Baughman; *Ex dolo;* Graver; Watkins.

Kingston's Case is the most widely cited in both England and America. Like *Chandelor* some of its features have been greatly modified, for now the rule is, *a plea of res adjudicata must be pleaded, else it is waived.* Wright: 28: cases. The influence of *Salus populi suprema lex,* as expressed in *Interest reipublicæ ut sit finis litium,* caused the court in Kingston's Case to state a singular and erratic rule, which is that the record of a former adjudication is admissible in evidence without pleading it, and in such case the court or jury could view it as they chose. See *Res adjudicata.*

77. MONDEL v. STEEL (1841), 8 M. & W. 858, Sedgk. Lead. Cas. Dam. 363, 9 D. C. P. 812, 5 Jur. 511: stated, 2 Sm. L. C. 934, 936, 937: cases, 8th ed., 6 Mews' E. C. L. 993; 12 *id.* 694; 15 *id.* 1828, Bliss, Pl. 370, n., Bro. Max. 339, Brown, Jurisdic.; Wat. Set-off, 531; 204 U. S. 286 (a cross demand is not a defense.)

Cited, p. 15; §§ 129, 130, 143, 145, 186, 216, Hughes' Proc.; § 104, Gr. & Rud.

Record proper is irrefragable as to what was in issue. See *Res adjudicata.* What the record makes certain cannot be contradicted. Brittain: 50. But the record may be explained. Gardner; McLaughlin.

The record cannot be contradicted, but consistently with it, and within it, the persons and subject-matter may be identified. Gardner; Sanford v. Edwards; Draper v. Medlock. See Kempe's: 117; Iverslie: 46: cases; Russell v. Place.

Record is equitably construed. Barrs.

Default; what it admits. Bissell; McAllister; Jordahl, 72 Minn. 119, 45 L. R. A. 541, n., 71 Am. St. 469, stating Mondel (recovery does not bar recoupments and set-offs); Wat. Set-off, 573; Bendernagle. Real party in interest may be shown. Bauerman: 48.

78. TREVIVAN (or TREBIBAN) v. LAWRENCE (1705), 1 Salk. 276, 1 Sid. 54, 6 Mod. 258, 2 Raym. 1036, 1048, 2 Smith L. C. 743 (430-479), ext. n. in connection with Hughes v. Cornelius and Kingston's Case, 8th ed., 742-865, 11th ed. (with Doe v. Oliver and Kingston's Case reviewing English cases), Ewart, Estop. 207; 2 Herm. Estop. 610, 703, 704, Bigl. Estop. 7 Rob. Prac., Bro. Max. 336, 2 Chit. Conts., 1166, 1 Gr. Ev. 22, 23, 204, 531, Brown, Jurisdic.

Cited, §§ 131, 135, 138, Hughes' Proc.

Estoppel of record; principles of. The last esteppel prevails, and binds parties and privies.

Estoppels pass estates in land. Ewart, Estop. 206; Lindsay v. Cooper (Ala.).

79. MUNDAY v. VAIL (1871), 34 N. J. Law. 418; quoted, 140 U. S. 254, 17 Colo. App. 314. Cited, Hughes' Proc.

Leading Cases.—79. Munday.

Cited, §§ 48, 63, 100, 124-126, 152, 158, 165, 169, 201, 201*a*, 225, 236, 237, 239, 245, 248, 272, 278, Gr. & Rud.

Munday stated: Asa Munday, while owning land, borrowed money of Ephriam Munday. Afterwards Asa and his wife conveyed the land to Conger in trust for their children. Ephriam then sued and sought to charge the land with his debt, for it was agreed that he should have a mortgage on it, and claimed the conveyance was fraudulent. The plaintiff in this suit was a daughter of Asa and Hetty, and was a defendant in the suit to set aside the deed. She was then an infant and, although served with process (Galpin: 63) she did not answer with the other defendants. Upon the bill and answer of all the other defendants the court entered a decree setting aside the deed to Conger as fraudulent and void, and the same was ordered cancelled. It seems that afterward Asa paid or satisfied Ephriam. Later, under another judgment against Asa, the land was sold and a sheriff's deed issued to the execution purchaser, against whom the plaintiff, the said daughter of Asa and Hetty, sues in ejectment, the grantee, in said sheriff's deed. This grantee defended upon the ground that the deed to Conger was set aside, as already stated, and that he bought under a *regular judgment and execution, and thereupon received his sheriff's deed.* But his defense failed, for the reason that the infant daughter did not file an answer in the suit of Ephriam to set aside the Conger deed. For the want of such an answer the court had no jurisdiction to set aside the Conger deed, and therefore the levy upon the land under the judgment was null and void. These proceedings were *coram non judice.*

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have no cognizance of the class of cases to which the suit to be adjudged belongs. Second, the proper parties must be present. And, Third, the point decided must be, in substance and effect, within the issue." 34 N. J. Law, 422. See jurisdiction.

From the foregoing it may be deduced that pleadings are essential to confer jurisdiction; and also, that they enter into titles to property. See JURISDICTION.

Munday, Windsor and Williamson are cases that will illustrate the interactions upon titles to property and to contracts. They involve *Caveat emptor,* constructive notice and collateral attack. They also illustrate the fact that the law is a mesh of technicalities, that cannot be dispensed with.

Pleadings are the exclusive juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it. Pleadings are a limitation of a court's powers and they are strictly construed. *Verba fortius,* etc. The conserving principles of pro-

Leading Cases.—79. Munday.

cedure demand them. §§ 83-123, Gr. & Rud.; Windsor; Campbell v. Porter: Cases; C. v. Roby: Cases; Dovaston; 217. See IDENTIFICATION; Codes, 105 Mo. Ap. 694.

Allegations and prayer of a bill limit the recovery. Heath v. Hurless (1874), 73 Ill. 323; Sto. Pl. § 10. See Story. *Ad damnum.*

A court derives its power to exercise authority from its record; when this record does not clothe the court with power to proceed, then its acts are *ultra vires*—usurpation—abuse of power—and this will vitiate all into which it enters. *Debile fundamentum fallit opus; De non apparentibus,* etc.

A verdict taken upon a matter which is not issuable, or upon matter out of the compass of the issue is void. Taker v. Salter (1620), Hobart, 112*b*.

The mandatory record limits judgments and decrees. Jurisdiction depends upon the pleadings. See JURISDICTION. Munday v. Vail; Windsor v. McVeigh; Bloom v. Burdick.

Statutes providing for the answer and proceedings to raise issue of law and of fact are also mandatory. Indianapolis R. R. *Quod ab initio,* etc.

Statutes reaffirming the common law by providing for the statement of the claim is mandatory. Codes of the states are mandatory upon federal courts as to that. Indianapolis: 223.

When the record is silent as to a plea it will be presumed that one was interposed, even in a justice's court. Johns v. S. (1885), 104 Ind. 557. *Omnia præsumuntur rite,* etc. See Hubler.

Hubler v. Pullen (1857), 9 Ind. 273, 68 Am. Dec. 620 (payment pleaded but not replied to is not in issue. Trial without issue is error). *Contra* cases are found in Indiana. See rule in Illinois. Israel; Corbus v. Teed (1873), 69 Ill. 205: cases (waiver of replication); Strohm v. Hayes (1873), 70 Ill. 41 (replication); Jackson v. Sackett (1893), 146 Ill. 646, 653, 654, 35 N. E. 234 (answer); Hend. Eq. Pl. 521, 522: cases. These last cases oppose the rationale of Israel (replications cannot be waived); Van Zile Eq. Pl. 242 (replications may be waived: cases). Hitchcock; Avon Mfg. Co. v. Andrews (1862), 30 Conn. 476, 485-488.

An issue must arise from the record, from the pleadings filed. Avon; Simonton, 5 Pet. 141; Bassett v. Johnson; Foley v. Foley (1898), 120 Cal. 33, 65 Am. St. 147, n. See Kelsey v. Lamb (1859), 21 Ill. 559 (plea may be waived): cited, 50 Ill. 91, 79 Ill. 535. See Israel (a trial without an issue is a nullity); Borkenhagen; J'Anson: cited, Brown, Jurisdic. (a very instructive case).

A trial upon an answer without a plea is ultra vires—void. Israel; Hubler; Crain (instructive case). See DENIAL. L. C. 34-44.

Leading Cases.—79. Munday.

Issues must appear from the mandatory record. Hoskins; Parkinson v. P. (1890), 135 Ill. 401, 10 L. R. A. 91, n.; 3 Gr. Ev. 12; Yundt v. P. (1872), 65 Ill. 372 (plea in common-law record essential); Aylesworth (a plea essential in the record proper. The best evidence of an issue and of a hearing must be presented. The common-law record is the sole and exclusive evidence of the issue, what it was and of the hearing afforded. That record safeguards great constitutional rights, as we elsewhere note); Crain v. U. S.; Davis v. S.; Eiseman v. S. (trial without an issue shown by and upon the record is unauthorized). S. v. Thurstin; C. v. Roby.

A record is indispensable. U. S. v. Perez; Sperry v. C.; R. v. Wheatley: 49; Moore v. C.: 21; Windsor: 1. A record safeguards great constitutional guarantees, and therefore it is a constitutional implication. The rationale of the record and of the issue is exactly the same in civil cases. Munday; Crain; S. v. Thurstin; C. v. Roby.

A judgment outside the allegations and issues is void. Munday; Garland; Borkenhagen; Adams v. Gill; Gille v. Emmons (1897), 58 Kan. 118, 62 Am. St. 609, n.: cases, 1 Freem. Judg. 120, 120*c*; Bloom; Jansen; Reynolds; Windsor; R. v. Wheatley; Black, Judg. 180 U. S. 28, 471, 533; Saunderson (Wis.).

Parties (Sto. Pl. 259) and record matter essential for a court to act upon. Rushton; notes to Lampleigh; Cooke v. Oxley; Iversiie: cases; Murray: 219. See ALLEGATIONS.

Consent decrees beyond the issues, how far binding. Bigley v. Watson (1896), 98 Tenn. 353, 36 L. R. A. 679: cases; Nashville R. R. v. U. S. (1885), 113 U. S. 261; Pac. R. R. v. Ketchum (1880), 101 U. S. 289.

Issues and record matter is waived in several states. Among these are New York, Indiana, Illinois, Colorado and Missouri. Devry v. R. R., 192 Mo. 201: cases; (issues) Hill v. Drug Co. (1897), 140 Mo. 433; Hall v. Goodnight (1896), 138 Mo. 577. See THEORY OF THE CASE. Roden.

Reply to counterclaim may be waived. 123 Wis. 1, 107 Am. St. 924; 105 Mo. 279, 421 (reply waived).

Collateral attack is the means to resist usurpation and abuse of power. Borden; Campbell v. Porter: 2. See MANDATORY RECORD.

Pleadings essential to confer jurisdiction—authority—power upon a court to proceed. Deitsch; Thomas (Colo.): 15; Saunderson, 180 U. S. 28, 471, 105 Mo. Ap. 694, 533. This is denied by those courts holding that pleadings—the record—can be waived. See Dovaston. *Verba fortius,* etc.

Sperry v. C. (1838), 9 Leigh (Va.), 623, 1 Lead. Crim. Cas. 433-482 (B. & H.), ext. n., 33 Am. Dec. 261, 262: cited, Whart. Crim. Pl. & Pr. 511, 540, § 19.

Felonies; defendant's presence in person at

Leading Cases.—79. Munday.

the trial and at each step is indispensable, and the record must show this. Sperry; *Audi alteram partem:* Gore v. S. (1889), 52 Ark. 285, 5 L. R. A. 832, n.; S. v. Smith (1890), 44 Kan. 75, 8 L. R. A. 774, n., 21 Am. St. 266; Lewis v. U. S. (1892), 146 U. S. 370, 36 L. ed. 1011, n.; S. v. Atkinson (1893), 40 S. C. 363, 42 Am. St. 877, n.; Cool. Const. Lim. 388; French v. S. (1893), 85 Wis. 400, 39 Am. St. 855, n., 21 L. R. A. 402; Richards v. S. (1892), 91 Tenn. 723, 30 Am. St. 907, n.; S. v. Kelly (1887), 97 N. C. 404, 2 Am. St. 299, 11 Crim. Law Mag. 173-178; 1 Bish. Crim. Proc. 267-277, 1353, Whart. Cr. Pl. & Pr. 540-551; Clark, Cr. Proc. 148.

Presence required when sentenced, Sperry v. C.; 1 Bish. Crim. Proc.; and record must show this. Ball v. U. S. (1891), 140 U. S. 118; White v. U. S. (1896), 164 U. S. 100. Issue, etc., must appear of record. Crain v. U. S.; White v. U. S. It is well to observe that the accused person, a prisoner, is strictly protected by the record. And so is the infant. The record is a technical safeguard. To perceive and fully understand this is of prime importance to the practitioner. Preceding and following cases are designed to impress and to illustrate that fact. There are many phases of the principal question.

79a. REYNOLDS v. STOCKTON (1891), 140 U. S. 254 (35 L. ed. 464), 43 N. J. Eq. 343. Quotes and approves Munday. See also Windsor; Reynolds: stated in Gille v. Emmons, *sub,* Munday; 176 U. S. 356; Brown, Jurisdic.

Judgments beyond the issue void. Munday. *Cited* in Hume v. Robinson, to the point that pleadings can be waived. See *contra,* Jansen v. Hyde; 180 U. S. 28, 471, 533; Hanford; Campbell v. Porter; Dovaston.

Reynolds v. Stockton must be carefully read with the fact kept in mind, that Munday is quoted and approved. Beyond this is *obiter* that can be cited to sustain waiver of pleadings in some cases. The mandatory record is required by strict construction. Crain v. U. S. (instructive case).

80. HOSKINS v. P. (1876), 84 Ill. 87, 25 Am. R. 433, 2 Am. Cr. R. 484, 11 Am. Cr. R. 650, n. A plea of not guilty is essential for a trial, and it must appear of record. Crain; Davis v. S. *Sub,* Munday. See DENIALS.

Cited, § 9, Hughes' Proc.; § 286, Gr. & Rud.

81. BORKENHAGEN v. PASCHEN (1888), 72 Wis. 272, 39 N. W. 774: Brown, Jurisdic.; cited, 118 Wis. 613. S. P. Davis v. S.

Cited, §§ 5*a,* 6, 78, 104, Hughes' Proc.

Cited, §§ 11, 118, 119, 272, 278, Gr. & Rud.

Borkenhagen; stated; estoppel must be pleaded; evidence cannot supply a necessary pleading. Borkenhagen had a saloon, and the license was in his name. He appeared to own the property and to run the saloon. His wife lived with him. His creditor, Jungbluth, got judgment against him and levied upon whiskey and flour in the saloon. At this stage Mrs. B. replevined from the sheriff, Paschen, who seized under the execution. Mrs. B. recovered before a justice, and lost on appeal in the circuit court, but won in the supreme court, notwithstanding there was ample proof that she was estopped, as in Mitchell v. Reed (1858), 9 Cal. 204, 70 Am. Dec. 647; Horn v. Cole; for it appeared she had represented to the levying creditor that her husband owned the property. These representations *equitably estopped* her. Horn. But this was the defect: there was no plea of estoppel—this was not in issue, therefore the evidence was unavailing—it was surplusage. Shutte. Admitting evidence by consent did not supply the essential *allegata.* Munday; Wisconsin Co.; Crain; Saunderson.

Leading Cases.—81. Borkenhagen

All estoppels must be pleaded. Wright: 28. The facts must be pleaded like an authority. Hopper; or a justification. J'Anson; or as fraud is pleaded.

Allegata essential for the reception of evidence. A court is bound by its record. Munday; Gentry; 82 Am. St. 196; Gossom; 6 Bush (Ky.), 97, 99 Am. Dec. 658; Shutte: 291; Wisconsin Co. *Frustra probatur quod probatum non relevat.* Admissions upon the record are conclusive. Bradbury: 35. *Departures are not allowed.* Johnson, 124 Ala. 508, 82 Am. St. 196; Bristow; Huntsman: 135, 231.

Material allegations can not be omitted; they can not be waived. L. C. 1-23; 69-79; cases. Green v. Palmer: 90 (code).

The evidence must correspond with the allegations and be confined to the point in issue, 1 Gr. Ev. 51; 99 Am. Dec. 658, 662, 82 Am. St. 196; Huntsman: 231.

Issues must appear from the mandatory record. McLaughlin: 31; Munday: 79; Wright: 28; *Cf.* And. Steph. Pl.; 230, 2d ed.; 2 Thomp. Tri. 2310, 2311, citing Wisconsin cases.

Code prescription for the statement of a "cause of action," and for proceedings to frame an issue are mandatory. Indianapolis: 223.

Defenses not pleaded are waived. Borkenhagen; Cromwell: 27; J'Anson: 91; McKyring: 33; Gila, 205 U. S. 279. But not in all states. Hume: cases.

82. SKEATE v. BEALE (1840), 11 Ad. & Ell. 983 (39 E. C. L. R.), 3 P. & D. 587, Ewell, L. C. Inf., 775, n.

Cited, §§ 79, 157, Hughes' Proc.

A plea or answer must be sufficient, just like any other pleading. Ubi eadem ratio, etc.; J'Anson: 91; Field v. Mayor: 84; Garland: 60; Oystead v. Shed, *sub,* Dovaston; Crane, 10 Colo. 265, *sub,* P. v. McCumber; Wood, 24 Colo. 134; Israel (Ill.): cases. See Campbell v. Porter. Garland v. Davis; *De non apparentibus,* etc.; *Ambigua responsio,* etc.; *Verba fortius.*

An agreement made under duress of

Leading Cases.—82. Skeate.

goods is not void. Skeate; 5 Mews' E. C. L. 1053 (duress). See Sasportas.

83. ISRAEL v. REYNOLDS (1849), 11 Ill. 218. S. P. Borkenhagen.

Cited, §§ 9, 13, 30, 39, 89, 91, 98, 104, 168, 240, Hughes' Proc.

Consent cannot confer jurisdiction. Sto. Pl. 10; *Fabula non judicium.* Nor dispense with the mandatory record. Garland.

A trial upon an answer without a reply is ultra vires. Simmons, 76 Ill. 479; Munday. See Brazzle v. Usher (1820), Breese (Ill.), 35 (a plea may be waived). A court has no authority to order the trial of an issue not shown upon the record. A court is bound by its record. Israel. *Contra:* Kelsey v. Lamb (1859), 21 Ill. 559; cases. *Cited,* 50 Ill. 91; 69 Ill. 535; Shinn, Plead. & Prac. 448, 454; Hend. Eq. Pl. 521, 522, citing Illinois cases that answers, pleas and replies may be waived. Jackson, 146 Ill. 646, 653, 654 (answer waived: *Consensus*); Franklin Lode. (pleadings can be waived).

84. FIELD v. MAYOR OF NEW YORK (1852), 6 N. Y. (2 Seld.) 179, 57 Am. Dec. 435, n., Huff. 8 Wood. Conts. 453; 30 Me. 368, 6 Am. St. 207, 2 Lead. Eq. Cas. 1629, n.; Ryall v. Rowles; Bisph. Eq. 165, 166, 2 Pom. Eq. 706, 3 *id.* 1275, Gr. Pub. Pol. 352, 2 Beach, Pub. Corp. 1108. Watson v. Christle, *sub,* J'Anson. See ASSAULT AND BATTERY; FALSE IMPRISONMENT; JUSTIFICATION MUST BE PLEADED.

Cited, § 303, Hughes' Proc.; § 278, Gr. & Rud.

Pleading; waiver. Defenses not pleaded are waived. Cromwell; 57 Am. Dec. 440, n.; McKyring: Wells v. Abrahams (1872), L. R. 7 Q. B. 554; 41 L. J. Q. B. 306; Munday; Price v. Seeley *sub,* JUSTIFICATION; J'Anson; *Expressio unius,* etc.: Van Fleet, For. Adj. 91, 179-206 (omitted defenses); 1 Encyc. Pl. & Pr. 830-851; Wheeler, 24 Ill. 40; Oystead v. Shed (1816), 13 Mass. 520, 7 Am. Dec. 172; Consolidated Coal; State Bank v. Felt (1896) 99 Ia. 532, 61 Am. St. 253.

The right to rely on the defense pleaded must be affirmatively shown by the answer. Verba fortius. 1 Encyc. Pl. & Pr. 831. A justification must be pleaded, if relied upon. Mostyn. Commonly it is said that the object of the rule is to prevent surprises; but other reasons may be discovered. *De non apparentibus,* etc.; J'Anson. See IDENTIFICATION. §§ 84-123, Gr. & Rud.

If transaction is illegal. See *In pari delicto,* etc.; *Consensus tollit errorem;* Holman v. Johnson: 363.

Pari delicto transactions need not be pleaded. See *In pari delicto.* It is sufficient if they appear from the evidence, record or proceedings in the case; courts will *ex officio* notice them. Hennen v. Gilman (1868), 20 La. Ann. 241, 96 Am. Dec. 396, n.; Bowman v. Gonegal (1867), 19 La. Ann. 328, 92 Am. Dec. 537; note, 93 Am. Dec. 510; 2 Beach, Conts. 1740. Illegality which affects the public cannot be waived. *Res inter alios acta,* etc.

Leading Cases.—84. Field.

Assignment of demand to become due. Field v. Mayor, etc.; Warmstrey v. Tanfield; 2 Pom. Eq. 706, 3 *id.* 1275; Metcalf v. Kincaid (1893), 87 Iowa 443, 43 Am. St. 391, n. (wages to become due). See Ryall v. Rowles.

Possibilities; expectancies. Wages and profits to be earned are assignable, if not contrary to public policy. Field v. Mayor, etc.; *cited,* 2 Pom. Eq. 706, 3 *id.* 1275; Edwards v. Peterson (1888), 80 Me. 367, 6 Am. St. 207 (but not under an existing contract); Rowe v. Dawson; 1 Beach, Eq. 333; Ryall v. Rowles; Walton v. Horkan (1901), 112 Ga. 814, 38 S. E. 105, 81 Am. St. 77, n.

Assignee of a part may sue for it. Field v. Mayor, etc.; Grain v. Aldrich; 2 Pom. Eq. 707 *Contra,* McDaniel v. Maxwell (1891), 21 Or. 202, 28 Am. St. 740, n.

Salaries of public officers; assignment permissible. Field. *Contra,* 3 Pom. Eq. 1276: cases; Gr. Pub. Pol. 352, 1 Beach, Eq. 339. *In pari.*

85. HORAN v. WANRENBERGER (1852), 9 Tex. 313, 58 Am. Dec. 145-149.

Cited, § 3, Hughes' Conts.; §§ 6, 52, Hughes' Proc.; §§ 124, 128, 201, Gr. & Rud.

One claiming the benefits of an adjudication or sequestration must allege and prove it. Clem: 2*b*. This duty is not foreclosed by a judgment of the supreme court. No judgment is ever exempt from attack for usurpation—abuse of power. Consent cannot confer jurisdiction of subject-matter.

Sto. Pl. 10; Windsor; Campbell; J'Anson; Perez; 2 Cyc. 1032.

From the Horan Case we may deduce that collateral attack is an original, underlying, fundamental remedy and method of defense against usurpation. Original compacts of society stipulated for it, and constitutions, statutes, codes and rules of court contemplate it, and should be so construed, as elsewhere noted. Accordingly appears the far-reaching rule of pleading, *i. e.,* that the ground of the general demurrer is never waived, and that it searches the whole record (essential pleadings) and attaches to the first fault. Filing an answer will not waive such defects, is a usual code provision, which leaves the way open for motion in arrest, and for judgment *non obstante veredicto,* remedy on appeal or review (Campbell v. Porter), or injunction, *certiorari,* prohibition, *habeas corpus,* and other extraordinary defenses.

The ground of the general demurrer may be renewed or raised at successive stages and from first to last, and is never waived, condoned or acquiesced in; for it is the duty of the court itself to raise it—to protect a party before it from usurpation; and so it is the duty of the adverse side (Campbell v. Porter), and that duty never shifts to him who is averred a delict. One cannot contract to assume it, else consent would confer

Leading Cases.—85. Horan.

jurisdiction, which is never permitted. The authority of any court may be inquired into. 70 L. R. A. 77.

De non apparentibus et non existentibus eadem est ratio; Debile fundamentum fallit opus; Dovaston, where is cited Wall (as to a *coram non judice* proceeding); Hitchcock.

Collectively consider with the above, Campbell; COLLATERAL ATTACK; notes to Lampleigh; Dovaston; Windsor; Munday; *Audi;* Deputron; Wheatley; Moore v. C. See *Dictum;* OPINION; PRECEDENTS; Cohens.

A judgment depends upon its foundations. Clem. Notes to Lampleigh; *Debile;* Dovaston; notes, C. v. Roby. Houston.

Execution and judicial sales depend upon the mandatory record. Notes to Lampleigh; Kleber on sales.

Courts are bound by their records; for them a record is provided from public policy. This record is to test their acts, and for this purpose the record is made a lasting memorial for future reference. It can not be waived or dispensed with.

Dicta of courts never bind or obligate. It is the edifice without a foundation, which architecturally must be forever condemned. *Debile.* It is not even so much as the deed made without authority, for it may be ratified; but the judgment and the opinion without authority cannot be ratified. *Quod ab initio.* Authentic opinions have nothing to do with *res adjudicata,* much less dicta. In courts that dispense with pleadings and the mandatory record the foregoing views cannot apply.

86. HANFORD v. DAVIES (1896), 163 U. S. 273 (41 L. ed. 157). Page Conts., 742.

Cited, §§ 23, 78, 79, Hughes' Proc. Cited, §§ 53, 60, 113, 116-119, 137, 267, 268, 270, Gr. & Rud.

All state agencies except the legislative may impair the obligation of contracts. Hanford; Mississippi R. R. Co. v. Rock (1867), 4 Wall; Central Co. v. Laidley (1895), 159 U. S. 103; Turner v. County (1899), 173 U. S. 461; Wood v. Brady (1893), 150 U. S. 18. See Ford v. Delta Co. (1897), 164 U. S. 662; Graham v. Folsom.

Want of "due process of law" in proceedings of a probate court is not sufficiently alleged to show a federal question by the allegation that the court acted entirely without jurisdiction. Hanford. This is a conclusion of law and is insufficient. Cruikshank; J'Anson; Hopper; *De non apparentibus,* etc.

It stands to reason that jurisdiction cannot be shown on one day by less matter than on another. Consequently appears the reason why the record must be pleaded in *res adjudicata* proceedings.

That an ordinance is unconstitutional without specifying what ordinance and what part of the constitution is violated or is in conflict, is void for uncertainty.

Leading Cases.—86. Hanford.

It is obnoxious to convenience. Excelsior: 188 Mo. 129-132.

Facts, not conclusions, must be pleaded; A general allegation that a judgment was obtained by fraud and that the court was imposed upon, is not sufficient to give jurisdiction of a suit to set the judgment aside, but the facts showing such fraud and imposition must be set out. Travelers, 49 C. C. A. 309, 111 Fed. 270, 55 L. R. A. 538. Kinnier, 45 N. Y. 532, 6 Am. Rep. 132, 14 Cyc. 822.

Conclusions of law will not confer jurisdiction of a subject-matter; they do not authorize a court to proceed with a case. Courts reason from pleadings, and as this quotation will indicate:

"It must not be forgotten that we are dealing with pleadings, not evidence, and with pleadings which, as we have said, evidently put the plaintiff's case as high as it can be put. Therefore there are no inferences to be drawn, and therefore cases like Hammond v. Bussey, 20 Q. B. Div. 79, do not apply. It is a simple question of allegations, which by declining to amend, the plaintiff has admitted that it cannot reinforce." *Verba fortius.* Globe Co., 190 U. S. 540, 546.

87. RUSSELL v. MANN (1863), 22 Cal. 132. S. P. Rushton. *A pleading must describe a cause of action or a ground of defense.* J'Anson; Skeate; Hodgson, 168 U. S. 262; Williams v. Hingham; Cruikshank; C. v. Bean; *De non apparentibus,* etc.; *Fabula,* etc.

Statutory rights demand strict description. Russell; Suth. Stat. 398, 399; Williams; S. v. Thurstin; R. v. Waverton. *Also statutory crimes.* Ledbetter v. U. S. (1898), 170 U. S. 606. See Poole v. P. (1898), 24 Colo. 510, 65 Am. St. 245, n. (exceptions need not be negatived).

Personal representatives must comply with a statute before suing. Hagen v. Kean (1875), 3 Dill. (U. S. C.) 124, No. 5899, Fed. Cas.; St. Louis R. R. v. Needham (1892), 52 Fed. 371, 10 U. S. App. 339 (necessary parties jurisdictional).

88. GENTRY v. U. S. (1900), 41 C. C. A. 185, 101 Fed. 51. Cited, §§ 22, 78, 79, 107, 168, 176, 185; § 119, Gr. & Rud.

A court is bound by its record. Pleadings confer jurisdiction, and these cannot be departed from; and to do so renders all proceedings a nullity. Borkenhagen. This case holds with the Rushton, Wheatley, Eddy Co., Munday and Windsor cases. and it stands to support a motion in arrest of judgment. McAllister; Dovaston. It should be compared with Haley v. Kilpatrick (1900), 104 Fed. 646 (defense assumed from conduct and not subject to a motion *non obstante veredicto*). See Supply, 10 Colo. 327, 3 Am. St. 586; Hume. *Cf.* J'Anson.

89. PROVIDENT LIFE AND TRUST CO. v. MERCER COUNTY (1898), 170 U. S. 593-606 (42 L. ed. 1156).

Municipal and county boards have provided for them a statutory record, which must exist and evince their acts. See

Leading Cases.—89. Prov. Life.

Hopper; Andes v. Ely (1896), 158 U. S. 312 (estoppel from objecting).

Estoppel of record upon town. Huron, 57 U. S. App. 593, 86 Fed. Rep. 272, 30 C. C. A. 38, 49 L. R. A. 534, n.

90. GREEN v. PALMER (1860), 15 Cal. 411, 76 Am. Dec. 492, n. (facts not conclusions, must be pleaded); Piercy; Sto. Pl., § 10; 1 Gr. Ev. 64; 2 *id.* 7; 3 *id.* 16; Rushton: 5, 19, 21, 22, 23, 91.

Cited, pp. 5, 29; §§ 5, 142, 153, 252, Hughes' Proc.; §§ 142, 202, 254, 278, Gr. & Rud.

Negative allegations, if proper, need not be proved. Green. What must be alleged. Green. *De non apparentibus,* etc.

Evidence should not be pleaded. Green; McCaughey; And. Steph. Pl. 218.

Facts should be alleged directly and positively, without argument or inference. Green; McCaughey (instructive case): 184; Cruikshank: 232; Mallinckrodt: 12*a*. See ARGUMENTATIVE; ALTERNATIVE; HYPOTHETICAL; And. Steph. Pl., § 204 Tyl. ed. 339.

Rules of *res adjudicata* suggest the importance of certainty. Green; Outram; Cromwell; C. v. Roby: Dovaston.

After Field's accession to the supreme court of the United States, such conclusions as we find in Farni v. Tesson ceased. Field decided Green, also Windsor, and dissented from Cooper v. Reynolds. In Green he defended the code with great force and ability, and enumerated certain slanders of it by those who did not understand it. See Dovaston; J'Anson.

Matter of law need not be pleaded. See JUDICIAL NOTICE; Lanfear: 181.

91. J'ANSON v. STUART (1787), 1 Term Rep. (D. & E.) 748, 2 Sm. L. C. 987-1001, 8th ed.

Cited, §§ 11, 13, 30, 99, 108, 239, Gr. & Rud.

J'Anson stated: Confession and avoidance pleas; essentials. Stuart published of J'Anson that he was a swindler and confidence man, for which J. sued. S. defended upon a plea in glittering generalities, *i. e.,* that J. was illegally, fraudulently and "dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had dealings and transactions, wherefore he printed and published," etc. To this a special demurrer was interposed, objecting that no facts, dates, items or persons were set forth. *Held,* that the plea was bad; that fraud must be specifically pleaded.

Ex dolo malo, etc.; Pearsall; Jenkins v. Long; Bigl. Fraud, 450. J'Anson cited and approved in Van Ness v. Hamilton (1822), 19 Johns. 349, 368; 1 Chit. Pl. 569, 7th ed.; 569, 16th Am. ed. *In generalibus versatur error; Dolus.*

General allegations allowed in criminal cases only where the charge is keeping a bawdy-house or barratry. J'Anson. In all criminal cases facts must be pleaded. Cruikshank; C. v. Roby; Moore v. C.; Zierenberg v. Labouchere (1893), 3 Q. B.

Leading Cases.—91. J'Anson.

183-191; 9 Rul. Cas. 105, n. Justification pleas must set out the particular instances. Oystead v. Shed (1815), 12 Mass. 505.

The general rule that there must be pleadings, and they must be certain, has few exceptions. Reasons for this rule must be gathered from all the grounds, which are nowhere fully enumerated. As to enumerating and defining these, most works are sadly defective. These reasons involve the conserving of principles of procedure.

Collectively consider S. v. Thurstin; R. v. Waters: U. S. v. Perez; R. v. Vaux; R. v. Vandercomb; C. v. Roby; *Fabula non judicium;* Campbell v. Porter; Cromwell; Dovaston.

Fraud must be specifically pleaded. Clark v. Reeder (1895), 158 U. S. 505-531; Farrar, 135 U. S. 609. This is a mandatory essential and non-waivable requirement, and applies to all pleadings. *Nichols v. Stevens* (1894), 123 Mo. 96, 45 Am. St. 514 (instructive case). Fraud must be specifically alleged and likewise denied. Bigl. Fraud, 454; 4 Encyc. Pl. & Prac. 664-672 (pleas of confession and avoidance).

Facts, not conclusions, must be pleaded. Green; Williams v. Hingham; Bartlett; Russell; Pom. Code, 535: cases; C. v. Eastman; S. v. Thurstin; Moore v. C. See *Omne majus continet in se minus;* Dovaston: 217.

Answers, pleas and justification defenses must be sufficient. J'Anson, 1 Chit. Pl. 563, 564; Skeate; Oystead, *supra;* Crane, 10 Colo. 265. Frivolous answers are nullities and may be stricken as void. Bliss, Pl. 421; Pom. Rem. 546; Johnson, 4 Colo. App. 183; Garland v. Davis; Nichols (facts must be pleaded, not conclusions of law). See FRAUD; Green; Bro. Max. 435.

Answers are as strictly judged as any other pleading. J'Anson; San Juan Co., 6 Colo. 214; 1 Chit. Pl. 566. *Ambiguum placitum,* etc.; *Ambigua responsio,* etc. Decisions that deny this depart from first principles. Dovaston.

Justification pleas; record essential for. Moore v. Watts (1822), Breese (Ill.), 42; Butler v. Nevin (1878), 88 Ill. 575, 578; West v. Hayes (1897), 120 Ala. 92, 74 Am. St. 24; Woodbridge v. Connor (1860), 49 Me. 353, 77 Am. Dec. 263 (one must see to a proper record for protection). Deitsch.

Nuisance; defense in, must set forth facts. Bro. Max. 381: cases; Flight v. Thomas (1839), 10 A. & E. 590 (37 E. C. L. R.); also justification pleas. See Bro. Max. 435; Smith v. Shirley (1846), 3 C. B. 142 (54 E. C. L. R.); Price v. Seeley, *sub,* JUSTIFICATION. A tax collector must set out his warrant. Butler v. Nevin. *An authority must be pleaded. Id.*

Non obstante veredicto motions afford a foundation from which much may be deduced, and exactly as from a motion in

Leading Cases.—91. J'Anson.

arrest, or from collateral attack, or the functions of the general demurrer.

Codes require that answers and replies be sufficient in substance. Still labored and even doubtful views are expressed, and the courts that deny the rule of the general demurrer, *i. e.*, that it searches the whole record and attaches to the first fault, are greatly respected. Pom. Rem., §§ 597-600: cases. See Hume.

Every presumption is against a pleader throughout, and even in a bill of exceptions. Mercantile, 205 U. S. 298. *Verba fortius,* etc. Dovaston; Sto. Pl. § 665; Walker v. Turner; notes to Lampleigh. *De non apparentibus,* etc.; Insurance Co.: 157 (bill of exceptions).

Defenses not pleaded are waived. J'Anson; Crepps. An authority must be pleaded. Hopper; Cromwell; Garland; Dickson. If one may raise a defense at any time and in any way, as so many courts are now holding, it seems that all the strict regulations of a defendant's pleadings might well be omitted. But see Munday.

Justification defenses must be pleaded. Field; J'Anson; Crepps; 1 Chit. Pl. 539, 545, 7th ed.; 536, 541, 16th Am. ed.; Woodbridge v. Conner.

Conclusions of law will not confer jurisdiction of subject-matter. Green; Hanford; Cruikshank.

Facts constituting, must be set out. Price v. Seeley; Mure v. Kaye, *sub,* CONCLUSIONS. An authority must be pleaded, and facts must show it; and what ought to be of record must appear from record. Iverslie v. Spaulding. See DUE PROCESS OF LAW RECORD.

Facts not conclusions, must be pleaded. 2 Add. Torts, 841; 1 Wat. Tres., 228, 246; And. Steph. Pl. 240; Watson v. Christie (1800), 2 Bos. & P. 224; 1 Wat. Tres. 270, 289; 1 Suth. Dam. 159; 2 Gr. Ev. 93, 97, 274; *In generalibus versatur error.*

Removal of causes from state to federal courts demand certain pleadings. C. & O. R. R. v. Dixon (1900), 179 U. S. 131. See CERTAINTY.

Mr. J. W. Smith, in 1835, selected eight cases representing great underlying fundamental principles of procedure supporting the entire fabric of jurisprudence, as will appear from a close investigation. These cases are: Rushton, Bristow, Dovaston, J'Anson, Rice, Crepps, Robinson and Kingston's Case. Evidently he thought they were of leading importance and that they were included within the meaning of "due process of law," as then defined, and as defined in Murray: 219; Cruikshank: 232.

The 8th edition of Smith's leading cases, contain all of Smith's cases. Since that edition the work has been made over by careless publishers, or local or provincial editors. By a comparison of the 7th, the 8th and the 9th editions the

Leading Cases.—91. J'Anson.

facts referred to will appear. The 9th edition is of but little value.

It will be very interesting and most instructive to determine the position of those cases in the law to-day. For that purpose all possible mention of them is made, as will elsewhere appear. They have been omitted, overlooked and misconstrued too long.

It should be observed that in several states no one can tell whether the principle in Rushton would be respected or denied, notwithstanding the fact that *codes reaffirm it in the most pronounced and explicit* way, and the same may be said of Bristow; and as it is with those cases so it is with J'Anson. The indefensible attacks upon Dovaston (*Verba fortius,* etc.) are referred to under that case. Crepps is both denied and upheld. Hume.

Robinson v. Raley opposes the demoralizing use of pleadings by making of them instruments of chicane. Notes, Cutter; Graver; Wonderly; *Fabula,* etc.

Conclusions of law not aided by denying them. Fost. Fed. Prac. 146; Dickson.

The law in Rice v. Shute is also denied in those states that disregard the pleadings and the essentiality of parties. J'Anson of course is denied along with Rushton and Dovaston. And. Steph. Pl., § 230: cases, 2d ed. (conclusion of law sufficient to charge fraud).

J'Anson may be cited to the point that facts, not conclusions of law, must be pleaded. (Green: 90.) That conclusions of law are a nullity and cannot be aided by a waiver or conduct, or by denials. Decisions that so hold maintain the doctrine of J'Anson.

It may also be cited to the point that *defenses not pleaded are waived.* If one does not present his defense at the right time and in the right way, he waives it; he cannot afterward insist upon a defense he did not plead. Defenses do not depend upon oralities, but upon juridical statements made in writing and filed with the clerk. (Munday.) For protection, the division of state power is involved and concerned. Such is the law in J'Anson, and to sustain this, decisions can be found in all states, and in several very contradictory decisions also. And as it is with J'Anson so it is with the Rushton, Bristow, Dovaston, Rice and Crepps cases. Admittedly the Kingston Case (rules of *res adjudicata* is in the greatest confusion. And of course that would result wherever the mandatory record is abolished or impaired, or as it is where the Rushton, Dovaston and J'Anson cases are denied. The abolition of that record carries with it all that depends upon it. The conserving principles of procedure depend upon that record. §§ 83-123, Gr. & Rud. Without more, it must be seen that all those cases are denied in many states. Consequently we may anxiously

Leading Cases.—91. J'Anson.

inquire after the meaning of "due process of law" under the "new dispensation."

Now, from such facts we may estimate the difference between the "late," the "modern" and the "American case," and what prominent and popular writers call "ancient" rules, or "the views of the older authors." All can see that a jurisprudence founded on the cases above mentioned is very unlike a system of laws that excludes them. In American states are diverse and hostile jurisprudences; they are tribal, and with each tribe are warring chiefs.

See notes to Lampleigh; Cutter; Horan; Dovaston; THEORY OF THE CASE.

Upholding the rationale in Crepps, in Kempe's Lessee and in Ransom, and denying it in Harvey: 123, and Cooper v. Reynolds, is not establishing any new rule, but instead, chaos. The decision in Windsor supports the rule in Rushton and overrules Cooper. From such facts, how can it be said that the rationale of the Rushton Case is obsolete? It certainly is not obsolete in the federal courts, nor in England, nor in one New England state, nor in New Jersey nor Wisconsin, and other states. And in New York, Indiana, Illinois, Missouri and Colorado and this class of states there are just as many decisions, if not more, supporting the Rushton and Crepps cases than oppose them. The "modern and enlightened view" must be established, namely, from decisions in those states. But when arrayed they will be found to be too incongruous and conflicting to establish anything that can be intelligently commended for that stability of law essential for protection.

It is indefensible to discuss the "modern and enlightened view" of a basic subject and of "due process of law" until the wreck of other systems is cleared away for the "view." A system of law developed upon the mandatory record is so unlike the ancient, the Asian and the African conceptions that the due process of law of the one is both grotesque and absurd if applied to the other. A system of laws founded upon Rushton, Wheatley and Windsor is one kind, while that which is founded on Cooper and other cases that confuse what relates to the division of state power and also the functions of the mandatory record and the statutory record are very unlike. To aid the reader to judge of Cooper it may be well to state that "Parson" Brownlow commenced the publication of his summons in the "Knoxville Whig" contemporaneously with the investment of Knoxville by the Confederate army under Longstreet. (It is fair to assume that Reynolds was without the city.) The summons was published during the siege, September 26 to December 4, 1863. But the case is, if possible, more objectionable for

Leading Cases.—91. J'Anson.

other reasons, and particularly for its disregard of the division of state power, and of the functions of the mandatory record, of the rule "what ought to be of record must be proved by record, and by the right record." *Expressio unius*, etc.

Due process of law cannot be defined under the conditions we indicate, and never can be satisfactorily, in disregard of the primal rule of evidence last mentioned. That rule lies at the base of a certain definite theory.

To select six truly great and leading principles or cases relating to any subject of the law, and then exclude them therefrom, or possibly worse yet, apply or reject them in wild, reckless alternation, there would result to those subjects what has happened to procedure in more than a dozen states.

Those who write and teach the law in ignorance or denial of the *datum posts* of old have made of jurisprudence, which is the greatest asset of government, a climax of absurdities and incomprehensible for the understanding. To illustrate: Look at the result of jumbling the history and uses of the mandatory and of the statutory records in New York, Illinois and states that have followed the "new and enlightened views" of New York and Illinois, as advocated by prominent authors. (2 Thomp. Tri., §§ 2310, 2311; And. Steph. Pl. 230, n., 2d ed.) The result is discoverable in Colorado, Indiana and Missouri. From the fountain of error, as to those records, necessarily follows the denial of *Verba fortius*, and of *Frustra probatur, quod probatum non relevat* and their cognates.

When the very able courts of other states state the liberal rules of code construction in New York, and of the Practice Act of Illinois, jurists of the highest order are lost in bewilderment, as the cases show. These courts are unable to gather the law from the decisions and authors of New York, and states that follow. See Atlantic. Old and influential orators at international conventions fail to mention what has come to "American law." If they stated the facts, then it would appear that American states are more widely apart than are the states of Europe.

If learned and venerable jurists cannot determine *datum post* law of a state then verily is the student menaced. See LITERATURE, Hughes' Proc.

States that deny the maxims of the unwritten constitution have filled their reports of decisions with "useless grists of profuse jargon," and made of jurisprudence an incomprehensible subject and hopelessly beyond human capacity. Lange: 159; Dovaston: 217.

Conclusions of law are insufficient. The object of a plea is to apprise a party of

Leading Cases.—91. J'Anson.

what he must meet, and the court of what it is to try, and all interested in the record of what was tried. Parks, 22 Ill. 522. See CONCLUSIONS. Answers mus be sufficient. Windsor; Equitable estoppel. Facts constituting must be pleaded. Hall v. Henderson. See ESTOPPEL.

Defenses not pleaded are waived. Cromwell, *e. g.*, that one is a *bona fide* purchaser. Clark, 186 U. S. 206; Kollock.

Justification defenses in slander and libel—defamation—suits must be pleaded. J'Anson; Rutherford, 180 Mass. 289, 91 Am. St. 282-309, ext. n.

Justification matter in trespass must be pleaded; it is not admissible under the general issue. Finch, 2 Stew. & Port. (Ala.) 83, 23 Am. Dec. 299. *Contra:* Barrett, 129 Ala. 179, 87 Am. St. 54, n.: cases.

Courts that disregard the rule of evidence above mentioned, and its cognates; *Verba fortius accipiuntur contra proferentum*, and *Frustra probatur quod probatum non relevat*, depart from the essential and basic principles of a constitutionalism. Those maxims are first principles of the prescriptive. Constitution. Windsor: 1; Lange: 159.

92. ROSEN v. U. S. (1896), 161 U. S. 29 (40 L. ed. 606), 10 Am. Crim. Rep. 251-272.

Indictments are subject to motion in arrest after trial and verdict. Substantial defects are not waived. McAllister; Slacum.

Grossly obscene and scandalous matter need not be spread upon a court's record. A general description of it is sufficient. If a defendant need further information he may apply for a bill of particulars. Rosen, Shiras and White, JJ., dissenting. Approved: Price v. U. S., 165 U. S. 312; Wilson v. U. S., 164 U. S. 702; Timmons v. U. S., 85 Fed. 206, 54 U. S. Ap. 586. See DEFAMATION. *Contra;* Bradlaugh v. R. (1878), 3 Q. B. Div. 607, 14 Cox, C. C. 68, 3 Am. Crim. Rep. 464-469, 470-503, 4 Mews' E. C. L. 1692; Bish. Crim. Proc. *q.v.* (bad after verdict—states R. v. Goldsmith: 20; and other cases); Green v. Elbert, 137 U. S. 615 (irrelevant argument stricken). What must be pleaded in cases of libel, publishing obscene matter, and forgery. Rosen: cases; R. v. Bradlaugh, 3 Am. Cr. Rep. 470-503.

The federal Supreme Court often departs from essential requirements either to sustain or to deny. See Breeze v. Haley: Hughes' Proc. Pettibone.

R. v. Bradlaugh proceeded upon the view, that what is necessary and material, however obscene and impure, must be admitted from *necessity*. Necessity is a ground and rudiment of law. A court ought not consider its record defiled by responsive matter depending upon facts that must be presented and considered from the nature of the case. Material allegations are essential for the due admin-

Leading Cases.—92. Rosen.

istration of justice, and therefore they must be permitted. *In præsentia majoris.*

Defamation. Exact words must be set out. 2 Bish. Crim. Proc. 808; J'Anson. When court will instruct a jury upon a point of law. Rosen, p. 43, 10 Am. Crim. Rep. 263. *Ad quæstionem*, etc.

93. WILLIAMS v. BANKHEAD (1873), 19 Wall. (U. S.) 563 (23 L. ed. 134); Bliss, Pl. 20, 196, Fost. Fed. Prac. 53, Van Zile, Eq. Pl. 15 Cyc. Pl. & Pr. 611.

Parties; their essentiality. Williams; Harrison, 95 Va. 721, 64 Am. St. 830; Savage, 19 Wash. 679, 67 Am. St. 751, n.; St. Louis R. R. v. Needham (1892), 52 Fed. Rep. 371, 3 C. C. A. 129, 10 U. S. App. 339 (necessary parties jurisdictional); S. D. v. N. C. (1904), 192 U. S. 286-352, citing California, 157 U. S. 229, 15 S. C. Rep. 591: stated in Kircher, 117 Wis. 68 (code rule); Douglas Co., 38 Wis. 179; Castle, 113 Wis. 346 (code rule is the common-law rule in equity); *Shields v. Barrow* (1856), 17 How. 130 (court will not set a deed aside unless all parties in interest are before it). 15 Cyc. Pl. 612.

The question of parties involves the argument of Audi alteram partem. Fabula non judicium. Cause of Action. Barney: 6 Wall. 288. And this question is as profound as any in law and involves the technical protection issuing from the mandatory record. It involves the ideas of what constitutes *coram judice* proceedings, the first rule of *res adjudicata*. Not even an injunction can issue or affect one not a party. Savage, *supra;* nor a receiver be appointed. Baker, 32 Ill. 79; Weaver v. Toney: 67.

Misjoinder and non-joinder of parties. See Rice. Not a ground of general demurrer. Svanburg v. Fosseen (1899), 75 Minn. 350, 43 L. R. A. 427: cases.

Party with an actionable interest is jurisdictional. Sto. Pl. 259, Sto. 206-262: cases, 1 Beach Eq. 105; Downey v. Seib, 185 N. Y. 926, 113 Am. St. 926-932. Ferguson: 264; Bro. Max. 329, n. Wronged person only can apply to a court. *Fabula;* Williams: 94; Swan Case. Courts are created to remedy wrongs, and these must be presented. Rushton. And the names of parties must be set forth. Wiebold: 98. All in interest must join. Recovery at law must end litigation. St. Louis R. R. v. Needham.

"Real party in interest" is a right that cannot arise out of fraud. One wrongfully holding commercial paper cannot recover upon it. One has no right before a court by his own wrong; he is not the real party in interest; this may be pleaded against him. City Bank, 29 N. Y. 554, 86 Am. Dec. 332.

Only parties named in a deed can sue upon it. Bro. Max. 547, n.. Chesterfield, 3 H. & C. 677, 691; Mews' E. C. L. 1350; Cooch; Briggs; *sub*, Taintor: 344; Huffc. Ag. 26, 127, 188.

In some courts the absence of the right

Leading Cases.—93. Williams.

party must be waived, 105 Mo. Ap. 242; 91 Mo. 268.

Agent having bound himself by a contract under seal, the principal may sue in *assumpsit*. Sto. Ag. 161, 162; 1 Pars. Conts. 63, 64; Rule 8: Dicey, Parties; Fullam, 9 Allen, 1; Traynham, 15 Tex. 170, 65 Am. Dec. 152; New Jersey Co. 6 How. 344. Rules relating to parties. And. Steph. Pl. 43, 2d ed., 99 Am. St. 414.

Necessary Parties; 15 Cyc. Pl. & Prac. 611-649. Sto. Eq. Pl. See PARTIES.

94. WILLIAMS v. EGGLESTON (1898), 170 U. S. 304 (42 L. ed. 1049).

Cited, §§ 12, 21, 79, 155, 156, 224, 329, Hughes' Proc.

Cited, § 312, Gr. & Rud.

Only a wronged party can complain to a court or assign error. Gibler: *Alterius circumventio*, etc. *Actio non datur non damnificato*; Smith, 191 U. S. Pr. 138 (the jurisdiction of this court can only be involved by a party having a personal interest in the litigation).

One of the essentials of "due process of law" is an actor, who shows his right to complain. Murray: 219 (what is due process of law).

Equity attaching for one purpose attaches for all. Ferguson: 264; Brugger: 162; Yellowstone Nat'l Bk., 19 Mont. 402, 44 L. R. A. 243.

A cause of action must be stated against all joined, else there is a want of facts. American Bk., 152 Ind. 582, 588: cases, 71 Am. St. 345, 350: cases.

95. RICE v. SHUTE (1761), 5 Burr. (Eng.) 2611, 2 Wm. Bl. 695, 1 Smith: 1405-1417; omitted in 9th, 10th, and 11th eds.; 5 Blackf. (Ind.) 95, Huff. & W. Conts. 486. See ABATEMENT.

Joinder and non joinder of parties discussed. Rice, in Robertson, 18 Johns. 459; Sheehey v. Mandeville (1810), 6 Cranch (U. S.) 253 (a judgment against one only is no bar to a judgment against two); Whart. Conts. 824; 1 Pars. Conts. 23-31.

All joint contracts should be sued jointly, and if they are not, it is cause for abatement, if pleaded. Rice. But if the facts appear in the declaration, then it is subject to demurrer, or may be assigned for error, and is subject to a motion in arrest of judgment. Bragg, 5 Blackf. (Ind. 95), Huff. & W. Conts. 486. Demurrer must point out necessary parties. 1 Beach, Eq. Pr. 78. See PARTIES.

Misjoinder of plaintiffs demurrable. 1 Beach, Eq. Pr. 79. *Misjoinder only a defense to him misjoined.* 1 Beach, Eq. Prac. 80.

Crimes; joinder of parties. Bish. Crim. Proc. 462*a*-476; Whart. Cr. Pl. & Pr. 301-309; Clark, Cr. Proc. 111-113. See JOINDER.

Only one wronged can claim that a law is unconstitutional. Winnebago, 205 U. S. 354.

96. GIBLER v. MATTOON (1897), 167 Ill. 18. Cited, § 12, 21, Hughes' Proc.

Assignments of error are a pleading. Gibler. See ASSIGNMENTS; APPELLATE PROCEDURE.

Only party in interest can assign error. Gibler; So. Pac. R. R. v. U. S. (1897), 168 U. S. 66; Williams, 93, 94. *Alterius circumventio alii non præbet actionem:* A deception practiced upon one person does not give a cause for action to another. See ACTIO; *Assignatus*, etc.

Abstract must contain matter upon which error is assigned. Gibler. See Abstract: 299; Vanderventer v. Goss.

Lurking questions in a record will not be sought; and picked out by a court. Gibler. Grand Trunk R. R. v. Ives. Vanderventer; § 52, Gr. & Rud. An index is not an abstract. Bishop v. Lowens (1896), 63 Hl. Ap. 351.

Leading Cases.—96. Gibler.

97. FARNAM v. BROOKS (1830), 9 Pick. 212-250, n.: cases; stated, 1 Bigl. Fraud, 115; C. v. Eastman: 22.

Cited, § 153, Hughes' Proc.

Indefiniteness must be aptly objected to. Held in Farnam (proofs may aid general allegation of fraud). See J'Anson; Dobson; *Frustra.*

How far proofs will aid a general allegation of fraud. Dovaston: cases; King v. O.: 205; And. Steph. Pl. 230: cases; J'Anson.

If, in a bill in equity to open an account settled, the facts alleged and proved show fraud, actual or constructive, in the settlement, the plaintiff will be entitled to relief, notwithstanding the bill contains no direct averment of fraud. Farnam is widely cited as to the duties of agents or trustees, one of which is that they be fair and open in their dealings. Michoud; Keech.

Concealment to affect the statute limitations. Farnam; Pearsall.

If the facts pleaded show fraud, this is sufficient without using the word "fraud" or "fraudulent." It is sufficient if the inference of fraud arises from the facts stated as inevitable sequence. See FRAUD; Warren, 157 N. Y. 259, 68 Am. St. 777; 2 Chit. Conts. 1039; Horne, *sub*, Chesterfield, *ante*, Dovaston: cases.

Laches; how these affect a beneficiary. See 1 Bigl. Fraud: Perry on Trusts; Wood on Lim.

Conclusions of law insufficient. Cruikshank: 232; Hanford: 86.

98. WIEBOLD v. HERMANN (1876), 2 Mont. 609; § 312, Gr. & Rud.

Names of parties; initials insufficient. Bates 7 Ark. 394, 46 Am. Dec. 293; notes, 42 Am. St. 562; Enewold, 39 Neb. 59, 42 Am. St. 557, n.; 1 Bish. Crim. Proc. 669-689*b*, Whart. Cr. Pl. & Pr. 96-119; Clark, Cr. Proc. 54, 94, 121; Herf, 10 Ohio, 263; Veasey, 93 Ala. 548, 13 L. R. A. 541, n., 4 Encyc. Pl. & Pr. 492, 493; And. Steph. Pl. § 167; Garwood, 38 Cal. 216-230 (S. P. as Wiebold).

Description of parties essential for jurisdiction. Williams: 93; *Fabula, etc.* Proof of names. 3 Gr. Ev. 22. *Idem sonans.* Pitsnogle v. C.; Moynahan v. P. Corporation name; what are the same, 105 Mo. Ap. 446.

What cannot be done directly cannot be done indirectly. Quando aliquid; Illsley.

Leading Cases.—98. Wiebold.

Corporate existence; when it must be averred to describe a party. Harris: 229.

Mistake of name; effect on records. Stuyvesant, 167 N. Y. 421, 53 L. R. A. 562. Thornilly (*idem sonans*).

99. McARTHUR v. HOWETT (1874), 72 Ill. 358, 359.

Cited, §§ 71, 128, 220, 223, 224, Gr. & Rud.

A plaintiff should look after the files. (*Actore.*) A party must defend the affirmative grounds of his recovery against the general demurrer, or grounds of collateral attack forever. Clem.

Necessarily the onus—burden of proof—must rest upon some one, and of course this should be the actor, and that is the rule. (*Favorabiliores*, etc.)

An appellant must present a sufficient record. If it omits an essential the appeal will be dismissed. *Nullus commodum*, etc. *Vandeventer v. Goss.* Convenience requires this. § 52, Gr. & Rud.

A defendant becomes the actor if he appeals. McArthur.

One seeking a review must present a proper record, affirmatively showing error. Redfield, 130 U. S. 623, 625 (duties of appellants); Insurance Co.: 157 (error must affirmatively appear); Bates: 225; Richardson: 230: cases.

100. BOWLUS v. PHOENIX INS. CO. (1892), 133 Ind. 106, 20 L. R. A. 400.

Cited, § 139, Hughes' Proc.

An answer is too narrow that assumes to be a full defense, when it is not. Bowlus; Oystead, 12 Mass. 505. S. v. Tomlinson (1897), 16 Ind. Ap. 662, 59 Am. St. 335: Walker, 150 Ind. 317, 324. See Rison: 253; Kraner: 299.

A denial and an affirmative plea cannot be in the same paragraph. Bowlus; And. Steph. Pl. 275. See Burley. Denials must not be too broad, nor too narrow. Pueblo County; And. Steph. Pl. §§ 139-141 (Tyl. ed. 238, 240); 1 Chit. Pl. 645.

No pleading should be either too broad or too narrow, with just one exception—the ground of the general demurrer may be added on argument, for a general demurrer is favored; it is in fact the court's pleading. It searches the whole record.

A pleading cannot be both an answer and a counterclaim. Indiana Ass'n, 151 Ind. 518; Waverton: 70.

Answers must not be too broad nor too narrow. 1 Chit. Pl. 541; Deitsch; Moors v. Parker (1807), 3 Mass. 310; Bradley, 7 Cow. 330; 1 Encyc. Pl. & Pr. 861; Sto. Pl. 443, 702, 852; Walker, *supra*. Motions; same rule applies. Baum, 150 Ind. 378, 389, 390: cases, 65 Am. St. 368.

Pleadings cannot be double. And. Steph. Pl. 175. Of rules which tend to produce singleness and unity of the issue. And. Steph. Pl. 175-190.

101. HASKEL v. HASKEL (1880), 54 Cal. 262. Cited, §§ 38, 277, Hughes' Proc.

Each cause of action must be perfect. Waters; Waverton. See SINGLENESS; CERTAINTY; Bliss, Pl. 119, 120, 121, 295.

A complaint must state a cause of action; it cannot appear from subsequent pleadings. Boyd. See REPLY; CONSTRUCTIVE NOTICE; AIDER.

One count may refer to another to avoid prolixity. *Verba relata*, etc., 80 Am. St. 948, 952; Waverton; Boyd: 62; Kewaunee: 29.

Leading Cases.—101. Haskel.

102. WONDERLY v. LAFAYETTE COUNTY (1899), 150 Mo. 635, 45 L. R. A. 386: cases, 73 Am. St. 474. P. 13; §§ 5, 6, 13, 15, 21, 22, 29, 31, 42, 52, 75, 79, 86, 93, 120, 130, 133, 135, 141, 147, 151, 152, 167, 183, 184, 321, 329, 349, 353, Hughes' Proc.

Cited, §§ 99*a*, 119, 122; 124*a*, 220, 241, 278, Gr. & Rud.

A judgment in a federal court founded on false jurisdictional allegations may be set aside in a state court. See Graver; S. v. Baughman: 268; SHAM PLEADINGS; California: 270: cases; Rutland's Case, 6 Rep. 53: stated, Bro. Max. 131; Watkins; notes, Cutter; notes: Lampleigh.

Fabula non judicium; Fraud vitiates a judgment. And it may be shown that a court was misled. Starbuck: 263; 2 Best, Ev. 595; Bro. Max. 329, n., 342, 715, 737, 971; S. v. Baughman, 1 Freem. Judg. 118; Needham: 261. Brown, Jurisdic. 1, 3; *Ex dolo malo*, etc. *Sham cases confer no jurisdiction. Fabula.*

A transaction out of which no wrong can arise should not be entertained. See Doyle *sub*, Mostyn; S. v. Baughman; Starbuck. *In pari.* Conferring jurisdiction on federal courts by contrivances, allowed in some cases. Dickerman, 176 U. S. 181. Allegations of citizenship conclude a party after final judgment. Riverdale Mills, 198 U. S. 188, 194.

In conferring and in the exercise of jurisdiction there is agency involved, and of course this must relate to a lawful subject-matter (*In pari*), and this cannot be upon falsehood and fiction. Therefore, an actual and real subject-matter is essential, and without it *Debile fundamentum fallit opus* applies.

Collusive convictions will be set aside as a fraud and mockery, the result of conspiracy and subornation of perjury. R. v. Gillyard, 12 Q. B. 527, 64 E. C. L. R., Bro. Max. 972.

Perjury is a ground for vacating a judgment. Graver. See Pico v. Cohn (1891), 91 Cal. 129, 25 Am. St. 159-171, ext. n., 13 L. R. A. 336; Friese, 26 Or. 145, 46 Am. St. 610; Colby, 59 Minn. 432, 50 Am. St. 420, Bro. Max. 262: cases; Barr.

103. GRAVER v. FAUROT (1896), 76 F. R. 257: cases, 22 C. C. A. 156, 46 U. S. App. 268: stated in Munroe v. Callahan (1898), 55 Neb. 75, 75 N. W. 151, 70 Am. St. 366, n.: cases. Cited, p. 13; §§ 5, 21, 22, 42, 52, 75, 86, 93, 98, 122, 133, 147, 151, 152, 153, 184, Hughes' Proc.; §§ 52, 99*a*, 119, 278, Gr. & Rud.

Exceptio falsi, etc.; *Peccatum peccato*, etc.; *Fabula non judicium; Leges non verbis*, etc.; *Facta sunt*, etc. Notes, Lampleigh; Cutter.

Leading Cases.—103. Graver.

Setting aside fraudulent decrees, obtained by false pleadings and perjury, permissible. Bro. Max. 327, 736. Marshall v. Holmes (1891), 141 U. S. 598, cited and followed. Ward, 102 N. Y. 287, Asbury, 148 Ind. 513; Scott v. McNeal, *sub*, Springer: 24: cases (a probate court cannot administer on a living man's estate).

Judgment on a false affidavit in attachment void. German Nat. Bank, 55 Neb. 103, 70 Am. St. 371; or a false allegation. Wonderly, Bailey, Jurisdic. 154-164, 45 L. R. A. 391; R. v. Eve (1836), 5 Adol. & El. 780, 31 E. C. L. R. See Bodfield v. Padmore, *id.* 785, n., Bro. Max. 262, 736, 8th ed. See also PERJURY.

False and sham pleadings actionable elements. Graver; Brown: 105; California; Lowry; U. S. v. Throckmorton (1878), 98 U. S. 61, distinguished, otherwise denied.

A respondent owes a duty to disclose the truth. Graver; Sto. Pl. 852, 853. And codes proceed upon the same rationale. Kollock; Piercy (one may plead as many defenses as he may have).

False and sham answers actionable. See MALICIOUS ACTS; Ferguson: 264. Graver; Mariott. Morality an implied factor of procedure. §§ 5, 5*b*, Hughes' Proc.

Relief from judgments and decrees. Ferguson: 264; Needham; Furman; Borden; Windsor.

False and fraudulent concealment of jurisdictional facts renders a decree void. Crouch, 30 Wis. 667, 670; Streitwolf, 58 N. J. Eq. 563, 78 Am. St. 630; Banner v. Blythe (1881), 17 L. R. Ch. Div. 480; California; Crowns; *Brown* (altering the papers to avoid statute of limitations); Weeks, Atty's, 81; Butler v. P.: 106; or for pleading a sham plea. Pierce v. Blake (1697), 2 Salk. 515, Jenk. 52; Blewitt v. Marsden (1808), 10 East, 237; Merrington v. Becket (1823), 2 Barn. & Cress, 81 9 E. C. L. R.; Fortescue v. Holt (1672), 1 Vent. 213, Weeks, Att'ys, § 81.

Domicile of parties in divorce, if an element, must exist in fact. St. Sure v. Lindsfelt (1892), 82 Wis. 346, 19 L. R. A. 515, n.; Borden; Bailey, Jurisdic. 161; Moffat v. U. S. (1884), 112 U. S. 24 (a patent to a fictitious grantee is absolutely void, even against a *bona fide* purchaser); Chester, 13 Cal. 558; R. v. Eve, *supra;* Munro; Ward; Ashbury, *supra.* Or assertion of jurisdictional facts. Wonderly. Or false telegram to get a continuance. Carter v. C. (1899), 96 Va. 791, 45 L. R. A. 310. Or to misrepresent the contents of a pleading to a court. Larson v. Williams (1896), 100 Iowa, 110, 62 Am. St. 544, Weeks Att'ys, § 81: cases; Sto. Eq. Pl. 266, 267.

Perjury securing a judgment, will be relieved against. Sub, Needham; Barr: 265.

Sham Pleadings. 96 Minn. 422, 113 Am. St. 630-663, ext. n.; McKyring: 33.

Leading Cases.—

104. LOWRY v. MOORE (1897), 16 Wash. 476, 58 Am. St. 49.

False and evasive answers are grounds for concluding one and for entering final judgment. Graver; California; Richley v. Proone (1823), 1 Barn. & C. 286, 8 E. C. L. R.; Garland: 60. *Actor quia contra regulam,* etc.; *Jurare,* etc.; Maxims: Bouv. Dic.

False pleadings were punished at common law. R. v. Gibson: 149: cases. Cited, § 15, Hughes' Proc.

105. BROWN, EX PARTE (1836), 1 How. (Miss.) 303 (altering file papers to avoid statute of limitations). Cited, §§ 75, 103, Hughes' Proc.

Cited, § 294, Gr. & Rud.

An attorney is subject to punishment for obtaining a rule or order, judgment or decree on false, equivocal or groundless suggestions. Weeks, Att'ys, § 81; California; Graver; Butler.

Or for pleading a sham plea. Pierce v. Blake (1699), 2 Salk. 515, Jenk. 52; Blewitt v. Marsden (1808), 10 East, 237; Merrington v. Becket (1823), 2 Barn. & Cress 81 (9 E. C. L. R.); Fortescue v. Holt (1670), 1 Vent. 213, Weeks Att'ys, § 81.

And judgment may be signed for. Lowry; Larson, *sub,* 103.

Sham and false pleading. Graver; Borden; Moffat; 1 Bailey, Jurisdic. 161.

106. BUTLER v. P. (1874), 2 Colo. 295. Attorneys liable for getting orders on groundless suggestions. See ATTORNEYS; Brown; Graver. See Rensberger: Colo.

107. PAIN, EX PARTE (R. v. Pain) (1826), 5 Barn. & Cress. 251 (11 E. C. L. R.), 7 Dowl. & Ry. 674, 15 Rul. Cas. 208, 29 R. R. 231, 8 Mews' E. C. L. 615.

Cited, pp. 9, 10; §§ 5, 5*b*, Hughes' Proc.

Cited, §§ 91, 253, 278, Gr. & Rud.

Two affirmatives do not make a good issue. And. Steph. Pl. 234. Nor two negatives. *Id.* Pl. 235. See *Posito.*

Pleadings ought to be true. See TRUE DOLUS.

Alternative pleadings are void. Pain; R. v. Sadler (1787), 2 Chit. 579, 18 E. C. L. R., Sto. Pl. 245, 245*a*, 253*a*, 254, 510; And. Steph. Pl. 204 (Tyl. ed. 339); Cruikshank; Dovaston: cases; Barnard: 108; Horne, *sub:* Chesterfield; Bell v. Brown; S. v. Leonard (1902), 171 Mo. 622, 94 Am. St. 794. *Allegans contraria non est audiendus.* Sto. Pl. 254. 1 Bish. Crim. Proc. 508; And. Steph. Pl. 233. See *Res Adjudicata;* T. R. R., 71 Ill. 174 (one is bound by his *ad damnum* as to amount of damages).

Pleadings must not be insensible or repugnant. Sto. Pl. 254. And. Steph. Pl. 229: cases, Phillips, Pl. 133; Maxw. Pl. 9, 10, 16; 1 Bish. Crim. Proc. 508-510; Whart. Cr. Pl. & Pr. 161, 162: cases; Clark, Crim. Proc. 72, 73; 11 Mews' E. C. L. 831; 65 L. R. A. 790, 60 *id.* 601.

If in an ejectment suit one were to aver the defendant was in possession of the land, and then that the defendant was in possession of a part, this would be an

Leading Cases.—107. Pain.

ambiguous or repugnant pleading, 145 Calif. 606, 68 L. R. A. 600.

Disjunctive, alternative and ambiguous affidavit for attachment will vitiate the proceedings and subject them to collateral attack. Drake, Attach. 101, 101*a* (able statement of rule). See ATTACHMENT. From attachments proceedings can be seen how the mandatory record must be sufficient to protect from collateral attack. Galpin: 63; Pennoyer: 58. And also to impart constructive notice. A seizure of "Black acre" or "White acre," these being distinct tracts, is palpably insufficient for constructive notice purposes, or any of the other conserving principles of procedure as elsewhere explained.

Degree of certainty required. Sto. Pl. 240-256; And. Steph. Pl.: 5, 231, 232; Phillips, Pl. 126-136. See *Res Adjudicata;* FORMER JEOPARDY; Russell: 27; CONSTRUCTIVE NOTICE; COLLATERAL ATTACK; APPELLATE PROCEDURE; Campbell v. Porter: 2; *Custodia legis;* Freeman: 287; DUE PROCESS OF LAW; Murray: 219.

Alternative averments; Certum est quod certum reddi potest. 6 Encyc. Pl. & Pr. 268.

Pleadings must not be argumentative. And. Steph. Pl. 233; 1 Bish. Crim. Proc. 508; Dickson: 34; cases (denials; inconsistent defenses).

Rules of res adjudicata exclude argumentative pleadings. From that viewpoint they are objectionable. A pleading that will not properly serve the conserving principles of procedure and its dominating ends, is faulty, and hence the importance of the last rule, and also the next, viz.:

Pleadings must not be by way of recital, but must be positive in their form. And. Steph. Pl. 237; Green (code): 90; Kewaunee (code): 29 (cannot be "fish, flesh, or fowl"). Smith v. Hodson: 156 (election of remedies). See *Res adjudicata.*

The importance of the issue may be gathered from Munday: cases; Dickson: cases; *Res adjudicata:* cases.

A pleading which is bad in part is bad altogether. And. Steph. Pl. 243; Rison: 253: cases. *Denials must be certain.* Dickson: cases. *Pleadings must be true.* Graver: cases. *Every presumption is against a pleader.* Dovaston: 217: cases. Pleadings must not be ambiguous, doubtful in meaning, and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading. Dovaston; And. Steph. Pl. 230: *Contra* cases (effect of omitted allegations after verdict); Maxw. Pl. 16 (approves Dovaston); Moore v. C.; Lea; 30. Kewaunee (code pleadings cannot be "fish, flesh or fowl"). Maxw. Pl. 10, 11, 16; Gibson v. Parlin (1882), 13 Neb. 292, (code): Horne, *sub.* Chesterfield.

A pleader states his case at his peril. Cruikshank: 232. Mallinckrodt; J'Anson: 91; *Verba fortius,* etc. The certainty of *Pain,* prevades all procedure and taxation—the inferior and statutory tribunal as well.

Leading Cases.—107. Pain.

Walker: 118; White: 130. One cannot practice law on the court's intelligence, or that of the adverse party. He must allege and state positively. Cruikshank; Huntsman: 231, 232; Rushton: cases; Rideout.

Ignorantia legis neminem excusat is strictly applied to a pleader. Dovaston: 217. He must confer upon the court jurisdiction by his pleadings. Phillips, Pl. 29, 181, 461-470, Drake, Attach. 83-113.

Repugnant allegations in attachment affidavit and statement of cause of action fatal; they will not impart constructive notice. Simmons; 107 Am. St. 890-898.

Caption and statement must agree. Leonard,—N. Y.—See Jackson v. Ashton.

A charge that one let certain "gaming table or bank" is bad, though the words "to-wit a pool table" follow. Taylor v. S. —Tex.—, 95 S. W.

He must make his foundations sufficient before he builds, or his edifice may truly be likened to the "house built upon the sand." *Res adjudicata,* constructive notice, appellate procedure, collateral attack, due process of law and other high policies in the final, searching sweeps, and imperious requirements, can only be stayed or satisfied by substance, certainty and sufficiency. *Debile.* From these viewpoints arises the demands for certainty, and by those requirements it must be tested. Discussions that omit these ends and purposes—those high policies—are not most instructive, if they are not confusing and misleading. See IDENTIFICATION; J'Anson: 91.

Indictment; duplicity; foundation of a judgment must be certain. Miller v. S. (1885), 16 Tex. Ct. Ap. 417, 5 Am. Cr. R. 94.

108. BARNARD v. CUSHING (1842), 4 Met. 230, 38 Am. Dec. 364, 1 Danl. Nego. Inst. 151, 159, Jones, Construc. Conts., 210. *Cited,* §§ 129, 149, Hughes' Conts.; §§ 112, 186, 186*a,* 224, 227, 233, 250, 256, 297, 302, Hughes' Proc.

Barnard stated: Construction; repugnant clauses. A note with a clause indorsed thereon, that the holder shall never sue upon it, is a repugnancy which vitiates the note. There can be no right without a remedy, and parties may contract the remedy away. Barnard; *Modus et conventio;* Greenh. Pub. Pol. 469.

All within the four corners of any document will be sought and the true meaning found. Barnard; Tuckerman v. Hartwell (1824), 3 Greenlf. 147, 14 Am. Dec. 225, n. (all within the four corners considered); Citizens' Nat. Bank, 126 Pa. 194, 4 L. R. A. 190, n.; Wright, 73 Mich. 493, 3 L. R. A. 50, n.; *Ex antecedentibus,* etc.; Boydell; Behling v. Ins. Co., *sub, Verba intentione,* etc.

Repugnant clauses in a contract, which shall prevail. Wisconsin Marine, 95 Wis. 111, 60 Am. St. 86-96, ext. n. The first clause of a deed will prevail. 2 Cool. Bl. 381, n., Bro. Max. 581. *Contra* in wills. 2 Cool. Bl. 380, n., Bro. Max. 583.

Leading Cases.—108. Barnard.

Courts are bound by the contracts parties have made. *Hoare v. Rennie* (1859), 5 H. & N. 19, 2 Sm. L. C. 39, 51 (8th ed.); Norrington; 1 Beach Conts. 122; Cutter; *Expressio unius*, etc., Bro. Max. 690.

Repugnant clauses are void. 1 Beach, Conts. 718, 2 Bl. Com. 379; *Verba fortius*, etc., Bro. Max. 581; Wilkins.

Pleadings; repugnancy is fatal in. Pain.

An estoppel against an estoppel sets the matter free, is a first rule of res adjudicata.

A reservation in a deed as broad as the grant, is void. Bro. Max. 627, 2 Dev. Deeds, 979. "Neither will the law permit a person who enters into a binding contract to say, by a subsequent clause, that he will not be liable to be sued for a breach of it." Bro. Max. 697; Kelsall v. Tyler, 11 Exch. 534. If a policy so provides, all payments are forfeited if all subsequent payments are not made promptly. *Sub, Verba intentione*, etc.

109. S. v. CONKLING (1894), 54 Kan. 108, 45 Am. St. 270-274, n.: cases.

Dead issues will not be reviewed for error. California; S. v. Baughman: 268.

110. P. v. McCUMBER (1858), 18 N. Y. 315, 27 Barb. 632, 15 How. Prac. 186, 72 Am. Dec. 515-526, ext. n.

Cited, §§ 93, 251, Hughes' Proc.

Sham pleadings; definition and practice relating to. P. v. McCumber; 96 Minn. 422, 113 Am. St. 630-653, ext. n. See SHAM; Bliss, Pl. 422.

Sham and false pleadings give no standing resting thereon. McCumber: 110; Bliss, Pl. 422; Graver. See MORALITY; *Bona fides; Mala fides; Fabula*, etc. They confer no jurisdiction upon a court. McCumber; Bliss, Pl. 422; Wonderly: 102: cases. False and sham pleadings give no right to trial. McCumber; Bliss, Pl. 422; Graver; *Fabula.*

Falsity of pleadings may be shown by affidavit. Patrick, 14 Colo. 20 Am. St. 253, n.; 1 Chit. Pl. 567; Richley v. Proone, *sub*, Lowry; Bliss, Pl. 422; Kay, 44 N. Y. 565; Gostorfs, 18 Cal. 385; stated, Bliss, Pl. 422, 3d ed.

Motion and demurrer; functions of each. Bliss, 420, 424; Travelers' Ins., 6 Colo. Ap. 190.

Sham, evasive, frivolous answer, made up of legal conclusions, may be stricken, on motion. Crane; Bliss, Pl. 422; J'Anson: 91.

Motion to strike, not debatable. Cottrill, 40 Wis. 555, 559; Bliss, Pl. 424.

Objections by motions and by special demurrer must be specific, positively defined, marked out. Sto. Pl. 457; Kraner; Bliss, Pl. 420, 424; J'Anson. See ABATEMENT.

Sham, false, scandalous, irrelevant pleadings (surplusage) stricken on motion. Sto. Pl. 267-270, n.; Cryps.

111. STURGES v. BURTON (1858), 8 Ohio St. 215, 72 Am. Dec. 582-590, n., Bliss, Pl. 119. *Cited*, §§ 5, 22, 214, 251, Hughes' Proc.; § 142, Gr. & Rud.

Prolixity shall be avoided; pleadings shall be in ordinary and concise language without unnecessary repetition. Sturges; Green; Dovaston; Cryps.

Leading Cases.—111. Sturges.

Performance of conditions; averring of. Under codes those are permitted in a general way. See CONCLUSIONS OF LAW.

Jurisdiction of inferior courts, averred how. Crepps; Pierstoff v. Jorges (1893), 86 Wis. 128, 39 Am. St. 881 (code provision to avoid prolixity); Bliss, Pl. 303; Young 52 Cal. 407 (duly rendered is not the equivalent of duly made or given); Stiles 12 Wend. 473, 27 Am. Dec. 142-150, ext. n. (code rule, conclusions of law); Crepps.

Causing useless costs; these should be taxed to party at fault. See COSTS. A cause of action cannot be repeated in various forms. Sturges; Bliss, Pl. 423, 5 Encyc. Pl. & Pr. 322. See Whitney: 112; And. Steph. Pl., §§ 102, 153. In the *Whitney* an exception is found, and the only defensible one. If cause is once fully stated, it need not be repeated. Sturges; Leonard, 20 Colo. 88; Spalding, 18 Colo. 86; 4 Encyc. Pl. & Pr. 623; 5 *id.* 303-341.

Exceptions are found in California, Iowa, Indiana and Kansas, with conflicting cases in Colorado. Leonard, 20 Colo. 88. The needless repetition of a cause of action was regretted. Rapelye, 3 Conn. 438, 8 Am. Dec. 199. And, on the other hand, uncertain brevity is to be avoided. Gardner; Edwards,—Kans.—1 L. R. A. N. S. 1050 (liberal rule for generality).

Pleadings showing a cause is barred by the statute of limitations may be demurred to. Sturges; Damon, 17 Wash. 573, 61 Am. St. 927; Zuellig, 60 Ohio St. 27, 71 Am. St. 707, n. But it must be expressly mentioned in a demurrer; the objection must be expressed. Bliss, Pl. 200. One statement is sufficient for all remedy arising therefrom, whether legal or equitable, and the different kinds of relief may be prayed from one statement, and in all cases where the causes of action may be joined. See CODE. *Cessante ratione legis*, etc. Whatever objection arises from a statement made may be objected to from such statement *i. e.*, if a ground of abatement appears, it may be demurred to; a plea further setting out the matter is unnecessary. See ABATEMENT.

Common counts permissible under code. Meagher, 3 Kan. 372, 87 Am. Dec. 476, n.; Cryps: cases.

112. WHITNEY v. CHICAGO & N. W. R. R. (1870), 27 Wis. 327. Pom. Rem. 576, Steph. Pl. 323 (Tyl. ed.); 5 Encyc. Pl. & Pr. 322. §§ 215, 324, Hughes' Proc.

Repetition of a statement or claim or of defense is forbidden. But this rule has an exception where the facts are unknown to the pleader or lie more peculiarly within the knowledge of the defendant. Cryps.

Whitney stated: W. shipped wool to Chicago, where it was destroyed by fire, either in the cars or in a warehouse where it was stored. Exact knowledge of its destruction was unknown to the pleader, who, therefore, pleaded the loss in four counts, in order to charge the railroad both as a

Leading Cases.—112. Whitney.

carrier and also as a warehouseman. The railroad filed an affidavit showing each count was for the same subject-matter, and therefore moved to compel W. to elect which count he would proceed on. This practice to compel an election was established, but in such a case it was denied, for the reason that the pleader did not know nor could be charged with knowledge of just how and when the wool was destroyed. In such cases, causes of action may be variously stated to meet various phases of evidence.

Statements of claims and defense must be single, in ordinary and concise language and without unnecessary repetition, is the usual rule. Sturges; Cryps; Pom. 576; 5 Encyc. Pl. & Pr. 323. *Duplicity forbidden.* Robinson: 45; 5 Encyc. Pl. & Pr. 302-338.

A common carrier is an insurer against all loss or damage to goods in his possession as such, except such loss or damage thereto as may be occasioned by the act of God or of the public enemy, or the shipper's own fault.

False and sham pleadings forbidden. Graver.

113. CREPPS v. DURDEN (1777), Cowp. 640, 1 Smith: 1079-1156, ext. n., (reviewing English cases); 100 Mo. 321; Van Fleet, Coll. Att. §§ 84, 805, 867; Beach, Pub. Corp. 529; 1 Dill. 343; Cool. Torts, 489; Bro. Max. 25; 4 El. & Bl. 422, 82 E. C. L. R.; Shear. Neg. 159; Harvey: 123. S. P., Galpin: 63; Piper: 114; Clarke v. May; Calder; Chase v. Hathaway; *Omnia præsumuntur*, etc.; Los Angeles, 118 Cal. 295, 62 Am. St. 234, n.; French v. Miller.

Cited, pp. 6, 15, 16. §§ 6, 7, 9, 12, 13, 23, 26, 27, 29, 70, 85, 110-112, 122, 170, 186, 190, 239, 243, Hughes' Proc.

Cited, §§ 61, 104, 108, 202, 231, 296, Gr. & Rud.

Crepps stated: Crepps, a baker, was convicted in four consecutive actions before Durden, a justice of the peace, for selling small, hot loaves of bread on a certain Sunday. Upon these respective convictions four executions issued and were served by a constable. Crepps sued the justice and the constable in trespass and succeeded in three of the cases, upon the ground that one can violate the Sabbath only once on the same day under a statute forbidding such labor on that day. A baker is not liable for each bun he bakes, nor a tailor for each stitch he takes on that day. Durden was guilty of an excess of jurisdiction, for which he was liable. Crepps may be cited to the point that there is no Sunday law without a statute, and also that such statutes are in derogation of the common law and are therefore strictly construed. See SUNDAY.

Defenses not pleaded are waived. Crepps; Cromwell.

The constable acted under regular process and this afforded him immunity. Therefore he was not liable. Savacool: 164.

Under the statute 7 James I., ch. 5, justices were permitted to plead the general

Leading Cases.—113. Crepps.

issue and give the special matter in evidence. This rule is adopted by many of the codes. These gather and reaffirm old and pre-existing rules and statutes. Sturges.

It was insisted in Crepps that each record of conviction was regular upon its face, and therefore each was presumed rightful, regular and valid (*Omnia præsumuntur rite et solemnitur esse acta*), but this view was rejected. This is a very important rule in questions of constructive notice and collateral attack. Walker: 118. See COURTS.

Excess of jurisdiction. Crepps; Piper.

Statutory tribunals, like boards of county commissioners, must make and keep a record. P. *ex rel.* v. Brown (Colo.); Montgomery; Piper.

Affirmatively appearing, means that the jurisdictional facts shall appear upon the grand (the essential) judgment-docket or record. §§ 27*a*-30, Hughes' Conts. That is, when summons issued, to whom it was given and the return of the officer, and the nature of the cause of action. Bates: 225. Such are jurisdictional facts, and these must be set forth and affirmatively and positively appear upon the face of the record and above the judgment. Kempe: 115, or in their proper place, Williamson: 65.

Transcripts of justice's judgments must, upon their face, be sufficient when removed into other courts for further proceedings. Carr, 39 Mo. 346, 90 Am. Dec. 470; Wooters, 137 Ill. 113; Walker; *Debile*, etc.

Jurisdictional facts must affirmatively appear. Lowe, 15 Cal. 206: cases. Generally, these are the issuance of summons, its return, and a description of the subject-matter and the facts showing the hearing and the judgment. Morrow, 4 Iowa 77: *cited*, Brown, Jurisdic. 20*b*: cases.

Conclusions of law will never do for facts, as that process "was duly served." Brown, Jurisdic. 20*b*, 22, 47*a*; Howard: 166.

Collateral attack is confined to the face of the judgment record of the inferior court; while of the superior court it includes not only the judgment but its foundations. Clem. Facts must *affirmatively appear* to sustain the judgment of a superior court, but they need not appear upon the face of the judgment record; it is sufficient if they appear from the files. Whether or not the statement of a claim is sufficient must be determined from the pleading filed to present it. Rushton. A superior court must have authority to proceed, but this authority need not affirmatively appear from the face of its judgment record. Here are important deductions to be remembered.

"Superior courts are presumed to act by right (1 Bish. Crim. Proc. 236, 722, 1350, 1356) and not by wrong, and their acts and judgments are consequently conclusive in themselves, unless plainly be-

Leading Cases.—113. Crepps.

yond the jurisdiction of the tribunals whence they emanate." Notes, Crepps, 1 Smith, Lead. Cas.; Freem. Judg. 24.

But the jurisdiction of limited and inferior tribunals cannot be presumed and must be shown *affirmatively* to confer validity upon their acts. Hence, when the facts necessary to give to such a tribunal jurisdiction do not appear on the face of the proceedings, and are not proved *aliunde* (where this is permitted), the whole will be void and will be set aside as a nullity when called in question in the course of any collateral controversy. Notes, Crepps, 1 Smith, Lead. Cas.

Superior and inferior courts. Galpin: 64; Church, Habeas Corpus; 2 Encyc. Pl. & Pr. 448-456.

Presumptions are sometimes made to uphold a justice's judgment, as where he grants an adjournment without the conditions precedent—an oath or consent—appearing from the record. Still these will be presumed where the record is silent as to them. Baizer, 28 Wis. 268 (most liberal rule); Heck, 75 Tex. 469, 16 Am. St. 915, n. (liberal rule); Munday. Whenever presumptions are made in favor of inferior tribunals to uphold them, there the distinctions between them and superior courts are practically obliterated. See Hannah: 128: cases; 117 Mo. 117: cases; Hahn. And this is the condition in several states. The following cases should be well considered.

114. PIPER v. PEARSON (1854), 68 Mass. (2 Gray) 120, 61 Am. Dec. 438-443, n., 2 Lead. C. C. (B. & H.) 304-308, n., 2 Smith, Torts, 635: cases; Pattee, Cas. Torts, 131; Mech., Pub. Off.; Mech. Ag.; Cool. Jaggard, Bish., Kinkead (states classified), Torts; 1 Bish. C. L. 460; Shear Neg. 159; Brown, Jurisdic. 47*a*. *Cited*, §§ 8, 9, 13, 27, 29, 110, 186, 190, 203; §§ 202, 231, Gr. & Rud.

Piper stated: Action of tort by Piper against Pearson, a justice of the peace of the county of Middlesex, and having jurisdiction of crimes committed in that county, except in the city of Lowell, wherein the jurisdiction of crime committed therein was exclusively vested in the police court of that city. Notwithstanding, Pearson assumed jurisdiction of a crime committed in Lowell, and to subpœna witnesses and to compel them to testify, among whom Piper was one. He refused to testify, and Pearson issued a mittimus committing him to jail. For this imprisonment he sued. To this Pearson answered that the imprisonment was in the due course of law, for a contempt of court. Under this general plea plaintiff gave in evidence: A complaint made by the defendant charging John Russ with an unlawful sale of liquors in Lowell, and a warrant issued thereon for the arrest of Russ, a mittimus issued by the defendant for the commitment of the plaintiff to prison for refusing to testify on the trial of said complainant before the defendant at Lowell, concerning sales of intoxicating

Leading Cases.—114. Piper.

liquors made by Russ and known to the witness; and a subsequent acquittal of Russ by the defendant.

B. F. Butler, for Pearson, insisted that presumptions of regularity attended the proceeding, and that defendant was entitled to immunity as a judicial officer. Nevertheless he was convicted.

The court *held* Pearson was guilty of excess of jurisdiction, for which he was liable. "If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence or conviction in such case, he thereby becomes a trespasser. 1 Chit. Pl. 210, 19 Johns. 39."

The court further observed: The defendant was guilty of usurpation—was sitting without authority—jurisdiction—and that no contempt could be committed before him while acting out of the law. The power to punish for contempt is an incidental power, which can arise only when there is an obstruction of the due administration of justice. Pearson was not proceeding with that, and therefore no contempt was committed before him.

"But in the next place, it was for the defendant to show a complete justification for the alleged trespass. If the record left it doubtful whether he had jurisdiction of the offense, it would not avail as a defense to the action. There is a marked distinction in this respect between courts of general jurisdiction and inferior tribunals having only a special or limited jurisdiction. In the former case, the presumption of law is that they had jurisdiction, until the contrary is shown; but with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction. Peacock v. Bell, 1 Saund. 75 and notes. Mills v. Martin, 19 Johns. 33, 34. The record in the present case *prima facie* shows a want of jurisdiction in the defendant. *Exceptions overruled.*" 68 Mass. (2 Gray) 124.

Clarke v. May (1864), 2 Gray (Mass.) 410, 61 Am. Dec. 470; Cool. Torts; Kinkead, Torts, 189. (Liability of judicial officers for excess of jurisdiction.)

Marshalsea Case (1613), 10 Coke, 68, 25 Am. Rep. 694, Cool. Torts; 1 Kinkead, Torts, 184 (English judges, when they act wholly without jurisdiction, have no privilege).

Houlden v. Smith (1850), 14 Adol. & El. (N. S.) 841 (68 E. C. L. R.), 14 Q. B. 841, 2 Smith, Cas. Torts, 639: cases; 4 Mews' E. C. L. 873; 2 Smith. Lead. Cas. 1030, 9th ed. Notes: Busteed v. Parsons, 25 Am. Rep. 688; Cool., Kinkead, Bish., Moak, Underh. Torts; Mech. Ag. 583, stating rules; New. Def., p. 426; 1 Wat. Tres. 60; Bro. Max. 86; Whart., Shear. Neg.; 27 L. R. A. 92.

Superior judges are liable for acts done under their command, out of their jurisdiction, when not misinformed as to the facts

Leading Cases.—114. Piper.

conferring jurisdiction. Calder; Lange: 159: cases; Stewart v. Cooley, *sub*, Lange.

When a magistrate has no jurisdiction, all who advise or act with him, or who execute his process knowing the facts, are liable. Houlden; Von Kettler, 57 Ill. 109, 1 Wat. Tres. 539: cases; Moak, Underh. Torts, 190; Barker (liability of attorneys on principle).

The mayor of a town is liable for arrest without a complaint or warrant, and although he is a conservator of the peace. Tillman, *sub*, Lange: cases, 46 L. R. A. n. (liability of judicial officers).

Calder v. Halket (1839), 3 Moore P. C. (Eng.) 28, 2 Lead. Crim. Cas. (B. & H.) 308-332, ext. n., Smith, Cas. Torts, 642; note, Busteed, 25 Am. Rep. 794, 2 Sm. Lead. Cas. 1030, 9th ed., 7 Mews' E. C. L., 2 Bailey, Jurisdic. 896-910, Mech., Throop, Pub. Off.; Mech. Ag. 587; Bro. Max. 86; Shear. Neg. 158; Kinkead, Torts, 184, 27 L. R. A. 92.

Ignorantia facti excusat. Where a judge is misled as to facts conferring jurisdiction, he is not liable. Calder, Moak, Underh. Torts, 194; Shear. Neg. 158.

A judicial officer acting bona fide, but deceived by appearances and the facts which apparently give jurisdiction, is not liable for his acts founded thereon. Calder: 2 Add. Torts, 886; 2 Sm. Lead. Cas. 1036, 9th ed.; Thompson, 93 Iowa, 386, 27 L. R. A. (large immunity given when they act *bona fide*).

"Affirmatively appearing" means expressly set forth and speaking upon and from the face of the record and within its four corners. Bro. Max. 95. Such records are not aided by the files, as are judgments in superior courts of record. In superior courts, various documents may show the court's authority to proceed and enter judgment, but in an inferior court the authority must *affirmatively* appear upon the record, and generally above the judgment or order. This requirement should be well understood. Nixon: 127.

In Piper the complaint, warrant, *mittimus* and judgment were all introduced, and, too, by the plaintiff.

Generally it is sufficient to aver the arrest or imprisonment, for the law will not presume one is beaten or imprisoned for a crime before it is shown. Innocence is presumed. Fraud and wrongdoing are presumed against. *De non apparentibus.* Accordingly, Pearson might have been left to plead his authority, under the rule that an authority—justification—must be pleaded. Hopper; J'Anson. It is for pleading a defense that the record is required, among other things. Savacool. Pearson admitted the wrongs, but justified. The burden of proof then devolved upon him. *Actore non probante reus absolvitur:* Dickson. Pleadings are to limit issues and to narrow proofs. Kollock. Presumptions may be relied upon. C. v. Kane; Bonnell: 183, 185.

Leading Cases.—114. Piper.

See further observations, Hughes' Proc. Also the maxim *Omnia præsumuntur rite.*

115. KEMPE'S LESSEE v. KENNEDY (1809) (Marshall), 5 Cranch (U. S.), 173 (3 L. ed. 70), Brown, Jurisdic.: stated in Ransom: 122. *Cited*, §§ 8, 9, 13, 23, 113, 186*a*, 188, 190, 243, Hughes' Proc.

Superior and inferior courts; proceedings *coram non judice* and merely erroneous that must be reversed on error. Cooper v. Reynolds; Campbell v. Porter. Judgments without records are disregarded. § 27*a*, Hughes' Conts. See COLLATERAL ATTACK; *Debile fundamentum fallit opus.* Presumptions from judgments. Ferguson: 264; Cooper; Starbuck: 263; S. v. Superior Court (1898), 19 Wash. 128, 67 Am. St. 724; Hannah: 128.

The presumption which the law implies in the support of judgments of courts of general jurisdiction arises only with respect to the jurisdictional facts concerning which the record is silent. *Expressio unius*, etc. Latta, 122 Cal. 279, 68 Am. St. 30. See Galpin: 63, 64. See Harrow.

All jurisdictional facts must appear upon the face of the record in statutory and inferior tribunals. Kempe and Walker cases; Bliss, 70 Ill. 343. *Contra*, Liss, 2 Colo. 85, 88 (subject-matter of suit may be shown by evidence *aliunde*. See Hume (Colo. cases). These are also *cited* under Piper). And in superior court records, at least, such facts must appear in the files. Sto. Pl., § 10; And. Steph. Pl. (Tyl. ed.) 160-162. See Kewaunee: 29; Wooters, 137 Ill. 113 (transcript from justice's court must present all facts to constitute a lien); CONSTRUCTIVE NOTICE. And a deed fails without a sufficient foundation. *Debile, etc.* Walker: 118. The issuance of the summons, its return, the appearance of the parties, if any, the nature of the subject-matter (Bates) and the judgment of the court, all must appear of record, Bliss, 70 Ill. 343, *supra;* Piper; Crepps. Contracts relating to judgments, and liens of, and titles founded on, often involve the examination of records. See *De non apparentibus;* COLLATERAL ATTACK; notes, Lampleigh; Horan, 85; Hughes' Conts.

116. WILLIAMS v. PEYTON (1819), 4 Wheat. (U. S.) 77 (8 L. ed. 518). *Cited*, Bloom: 266; 2 Cool. Tax. 1004 (onus of proof). § 22 Hughes' Proc.

Cited, §§ 23, 70, 120, 215, Hughes' Proc.

Sale of lands under a statutory power must be upon a strict compliance with law. Bloom; Thatcher; Cooper v. Reynolds; Walker: 118; Williamson: 65. This is in accord with a first rule of agency, *i. e.*, a special agent must act within his instructions. Batty. And also that rule of pleading that an authority must be pleaded and proved. J'Anson; Six Carpenters; Tarble's.

Actor and claimant must look to, produce and prove by a perfect record. Williams (rule ably stated and repeated in Ransom:

Leading Cases.—116. Williams.

122); Deputron: 121. (*Expressio unius*, etc.); *Actore non;* notes to Lampleigh: 301.

117. THATCHER v. POWELL (1821), 6 Wheat. (U. S.) 119, (5 L. ed. 221), 76 Am. St. 800, 2 Cool. Tax. 1004 (onus of proof).

Cited, §§ 215, 324, Hughes' Proc.

Sale of lands under statutory powers must be a strict compliance with law. Bloom; Williams: 116. See Cooper; Walker; Mohr v. Maniere: 68. Burden of proof is on claimant. Ransom.

118. WALKER v. TURNER (1824), 9 Wheat. (U. S.) 541, 6 Curt. Abr. 174.

Cited, §§ 12, 16, 17, 20, 23, 24, 27, 29, Hughes' Proc.

Inferior statutory tribunals must make of record "what ought to be of record and must be proved by record." Iverslie: 46. Kempe's; Thatcher; Williams; Williamson; Provident Life: 89. *Expressio unius*, etc., applies to records of inferior tribunals exactly as in Rushton; Deputron; Dovaston.

Jurisdictional facts must affirmatively appear, and also definitely describe, else the proceedings are *coram non judice. Fabula non judicium.* Doctrines of. Crepps, Miller, Milligan, Murray, Piper, Kempe: cases; Springer: 24; Story.

A sufficient record must exist to support a sheriff's deed. Williams: 116; Windsor; Douglas (lack of name in execution fatal); Munday; Clem.

Walker v. Turner stated. By statute, a justice has jurisdiction of twenty dollars,

"when the balance is due on any specialty, note or agreement, for money or specific articles, or for goods, wares or merchandise sold and delivered, or work and labor done." The justice's record recited an amount due "as appeared by the books of an intestate," whose administrator was suing. Upon that record, removed into a higher court, a levy and sale of real estate had taken place and a deed thereto had issued, and then the question was raised, whether under that statute the justice had jurisdiction of subject-matter, and if such proceedings were not *coram non judice.* And the court took this view, observing that it was consistent with the record (*Verba fortius*, etc.; Sto. Pl. 665; Van Cleaf) to assume that the amount claimed was for rent due, or for money advanced, or for money received to the use of the plaintiff, and even for money claimed by the plaintiff as due *ex debito* and charged in the books of the intestate. "It is obvious that the magistrate had no authority to take cognizance of these cases, and of others which might be stated; and since his jurisdiction was strictly special and limited, it is essential to the validity of his judgment and of the proceedings under it, that the record should show that he acted upon a case which the law submitted to his jurisdiction. Therefore all the proceedings and the deed founded thereon are null and void; such are not *coram judice.*"

9 Wheat. 649; White v. Wagar: 130.

The foregoing facts appearing from the mandatory record subjected the proceedings to collateral attack. Jurisdiction depends on the pleadings (Munday; Moore v. C.), the mandatory record, the thing described *inter alia.* Jurisdiction.

Leading Cases.—118. Walker.

Construction. Walker is sound construction, and is in harmony with Rushton: 5; Dovaston: 217; Hanford: 86; Hannah: 128, and cognate cases; these are not consistent with the claims for liberal construction which have contributed so much to the confusion of procedure. Correction of this must come from mastery of the basic rules of construction involved; for upon these are all dependent. *Cujus est instituere*, etc.

Omnia præsumuntur rite, etc., as a rule depends on cases like Walker and its cognates. The rule is also well stated in Crepps, Piper and cognate cases. But it is well to state that many cases are found denying that rule.

119. VOORHEES v. BANK U. S. (1836), 10 Pet. (U. S.) 473 (9 L. ed. 490). Stated, Cooper v. Reynolds; Pennoyer: 58; Harvey: 123.

Cited, §§ 65, 303, Hughes' Proc.

One claiming an adjudication must show it. Cohens; Brown, Jurisdic.; Horan. Presumptions are in favor of a record upon collateral attack. Voorhees; Cooper v. Reynolds; *Actore;* Windsor; *Omnia præsumuntur*, etc. Collateral attack and voidable error—distinctions. Voorhees; Cooper; Pennoyer; Windsor. Error that must be prosecuted by direct proceedings or it is waived—condoned—is voidable error. Voorhees. See Windsor. Grave jurisdictional defects—usurpation—can be resisted by collateral attack or in any way. Notes to Lampleigh; Borden: 266; Pennoyer; *Quod ab initio*, etc. See WAIVER; ABATEMENT; COLLATERAL ATTACK.

120. BUNKLE v. U. S. (1887), 122 U. S. 543 (30 L. ed. 543). Tucker, Const.

Cited, § 1, Hughes' Proc.

Necessary facts jurisdictional. Thomas v. Board.

A record of condemnation must present each jurisdictional fact affirmatively and with certainty. A court martial is a court of special and limited jurisdiction. Its authority is statutory and must be strictly pursued. The facts necessary to show its jurisdiction and its sentences are conformable to law, must be stated positively and not left to be argumentatively inferred. 2 Cool. Tax. 926. There are no presumptions in favor of such courts. Brown, 8 Pet. 115.

121. DEPUTRON v. YOUNG (1889), 134 U. S. 241, 257; Kleber on Sales, 2 Cool. Tax. 996, 1091; Hughes' Conts.; Ransom; Williams: 116; Thatcher: 117.

Cited, §§ 24, 28, 29, 44, 52, 120, 215, 217, 239, Hughes' Proc.

What one must produce and prove who claims upon a judicial or quasi-judicial proceeding. Clem.

De non apparentibus, etc.; *Actore non probante reus absolvitur; Expressio unius*, etc.; Horan; Munday; Walker: 116

Leading Cases.—121. Deputron.

(deeds founded on judicial and execution sales). Campbell v. Porter; Keene v. Cannovan; 2 Cool. Tax. 922-926; *Debile fundamentum fallit opus;* notes, Lampleigh: 301. See COLLATERAL ATTACK.

Records; how construed. Dovaston; notes, Lampleigh; Waters: 70.

"What ought to be of record must be proved by record and by the right record." 2 Cool. Tax, 926; Iverslie: 46. A tax deed is void unless under the proper seal. 2 Cool. Tax. 996, 1091. Void tax deed will constitute color of title in adverse possession. 2 Cool. Tax. 996, 1091.

122. RANSOM v. WILLIAMS (1864), 2 Wall. (U. S.) 313. *Cited,* p. 6; §§ 3, 5*a*, 10, 23, 24, 28, 29, 52, 71, 122, 215, Hughes' Proc.

Cited, §§ 89, 93, 124, 126, 128, 164, 201, 201*a*, 203, 224.

Ransom stated: Notice to representatives of a deceased judgment debtor essential before issuing an execution. Where a statute requires such notice, it is mandatory. Ransom recovered a judgment against Galbraith in the circuit court of the United States, in 1841, who conveyed his land to Williams in 1842. He died in 1843, and an administrator was promptly appointed. The land conveyed had been sold under an execution, all of which proceedings had been set aside and the court ordered another execution to issue, under which R. derived a sheriff's deed, upon which he sought to recover from W. in ejectment. W. defended upon the ground no notice of issuing the execution had been given as the statute required. Upon this the case hinged, and R. lost in all the courts, and for this reason: The plaintiff asserted a title, and it was for him to show everything necessary to maintain it. The rule on this subject is thus laid down by Chief Justice Marshall: "It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends upon acts *in pais,* the party claiming under that deed is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title." Williams v. Peyton: 116. Thatcher; Finch v. Martin (1857), 19 Ill. 110. An execution must be shown where this is required. Notes, Lampleigh; Munday; Windsor.

One claiming any right under a judicial or *quasi*-judicial proceeding, like taxation, must look to and protect the means of his proof. Deputron.

All interested in a title are charged with constructive notice of what public records show relating to that title. Purchasers under an execution buy *caveat emptor.* Ransom. For their information the record exists and is preserved. Officials are charged with making it under severe penalties, *e. g.,* if a sheriff fails to return his process, he is charged as trespasser *ab initio.* See Six Carpenters. There is a chain, and it has continuity, as is stated in Marshall's rule, already quoted. This rule recognizes the uses of the mandatory record for constructive notice, and the importance of this in the law of conveyancing—the stability and certainty of titles—and as affect much that relates to the law of contracts. As to that record must apply *Expressio unius,* etc., else it would better be dispensed with.

Ignorantia legis neminem excusat strictly applied to purchasers at execution and judicial sales. An order of a superior court cannot override the general law. Weaver v. Toney: 87.

Ransom v. Williams may be cited to these most important rules; that wherever notice is required in judicial proceedings, it is mandatory. *Audi alteram partem;* Weaver. That successful parties to an order granting their application to quash an execution and proceedings thereunder, and further directing that an execution issue, could further appear and object that they were entitled to notice of its issuance.

A statute in contravention of the common law is strictly construed. (At common law a *scire facias* must issue after death of a judgment debtor.) The statute was liberally construed. See Indianapolis, R. R.: 223.

An execution must conform to the record from which it emanates. Probatis extremis præsumuntur media. An execution should inform all from whence it comes and upon what it depends. The burden of proof devolves upon the party who holds the affirmative. *Actore non probante reus absolvitur;* Williams; Thatcher, *supra.*

That to sustain ejectment, not only a judgment, but its foundations—jurisdictional facts—the record—must be introduced, and also that notice of issuing an execution was given. Clem.

The best evidence of which a case in its nature is susceptible shall be produced. "What ought to be of record must be proved by record." Iverslie: 46; Galpin: 63; Runkle; Nixon. *Contra:* Harvey.

Objections upon collateral attack may be raised to all substantial defects that are grounds of the general demurrer or motion in arrest (McAllister) and to such defects arising after the entry of judgment. See Windsor. *The mandatory record may be augmented by statute.* Ransom; Harvey. Ransom should be carefully considered with Harvey, which next follows.

123. HARVEY v. TYLER (1864), 2 Wall. 328 (17 L. ed. 871).

Cited, p. 6; §§ 23, 24, 71, 312, Hughes' Proc.

Leading Cases.—123. Harvey.

Harvey stated: This was an ejectment suit in which statutes, jurisdiction, taxation, proof, pleading, the mandatory record and collateral attack were involved. The importance of the presumption of regularity —*Omnia præsumuntur rite,* etc.—will clearly appear, and also *Cujus est instituere.*

The mandatory record must be sufficient for constructive notice, Res adjudicata and to resist objections upon collateral attack, among other things. These are the usual accompaniments of a judicial proceeding: 1. A court of competent jurisdiction (the pleadings must be *coram judice*); 2. A wronged party for a plaintiff; 3. A wrongdoing party for a defendant; 4. A subject-matter of consideration; and 5. A certain judgment. 2 Wall. 346. In addition to those essentials, statutes may add other elements (Ransom), as in this case, that counsel for a defendant affected by the proceedings be present.

Coram judice proceedings require that all jurisdictional facts affirmatively appear of record. The above rules are clearly expressed in Harvey. To support these, Kempe: 115; Voorhees; Thompson; 2 Peters, 157, and Grignon v. Astor are stated and relied upon. Rushton; Munday.

The requirements of an adjudication as above indicated are exactly as required in Rushton: 5: cases. Besides these, the reader will find a masterly statement by counsel of the principle in Crepps, which is shown to be the law in Virginia and Kentucky (2 Wall. 335-336).

Harvey is criticised from facts gathered from statutes quoted (2 Wall. 330-334), which specified the conditions upon which the proceedings in question might be had. It does not appear that those conditions appeared to the court to invest it with jurisdiction of the particular subject-matter which is required by the court and already specified. Hopper: 4. The jurisdictional facts are not averred or shown or enumerated. 2 Wall. 334-338. Looking from the statutory requirements, there appears the omission of essential descriptive allegations, as is required in all the cases cited, and besides all those, let us add, as required in Rushton Case. See also Walker: 118; White: 130, and cases.

Besides the above, the rule laid down, that a superior court exercising a statutory power should have all presumptions in favor of the regularity of its proceedings, is not tenable. The rule in Ransom as to that is the sound one. Galpin: 64; Runkle: 120.

Exceptions to instructions must be specific unless the whole charge is faulty. Under this rule, appellant was refused a review of forty-three of his assignment of errors. Montgomery: 292, cases. Objections and exceptions must not be too broad, is a general rule of appellate procedure. § 53; CONVENIENCE; L. C. 290-299.

Leading Cases.—123. Harvey.

A judgment is an entirety. See JUDGMENTS.

The difficulties of defining the mandatory record will appear from a consideration of Ransom and Harvey.

Courts of superior and inferior jurisdiction defined and discussed in relation to the presumption of regularity. Galpin: 64.

Statutes are prospectively construed. *Nova constitutio futuris,* etc.; Bronson; Dash.

Plaintiff's counsel evidently treated the case on the theory that the statement of the ground for abating the taxes was fatally defective. His objections and masterly citation of Crepps, showing this case to be the rule in Virginia and Kentucky, speak more plainly than general commendation of his attainments. Before Mansfield, Marshall, Kent, Story or Shaw, his argument would have been appreciated, and also wherever Ransom, Galpin and Runkle would be consistently applied. The statement being bad, general exceptions to the instructions were sufficient. Shutte: 291.

The court referred to the necessity of enforcing *stare decisis* and its rules of court. It is regrettable it did not understand the rule in Rushton: 5; Bartlett: 6, and Crepps. *De non apparentibus,* etc. Instead, the court thought something new and changeful was before it; Justice Miller plainly says that, and also that the court is *rapidly settling the question.* In Galpin Crepps was vindicated; Cooper v. Reynolds was overruled in Windsor, and the *Slaughter House Cases* have given the court much trouble.

The influence of cases like Harvey has been far reaching and most meretricious in several states. Some of these hold that what the record should show may be shown by evidence *aliunde,* and that the mandatory record may be waived. A court that does not respect that record brings many calamities upon jurisprudence, and vicissitudes upon its best counsellors and friends. See LITERATURE; Hughes on Contracts; also PROCEDURE.

124. STOUT v. MASTIN (1891), 139 U. S. 151 (35 L. ed. 121), 2 Cool. Tax. 1000, 1001.

Tax deeds must be certain and conform to the assessment roll. Tilton: 133; Keane.

Assessment roll essential and warrant depends on it. Highlands, 24 Colo. 371; 1 Cool. Tax. 601, 962.

Certainty is essential in taxation. Stout; Tilton; Keane. And must be by the assessor and be his *bona fide* act. P. v. Hastings: 144. And be at the right time (Drew), and with certainty. 2 Desty. Tax., §§ 115-118.

125. MOSER v. WHITE (1874), 29 Mich. 59, 60; 1 Cool. Tax. 601, 577, 926.

There is no oral or parol levy and collection of taxes. Public policy provides for and demands a record. *Salus populi,* etc.; Cool., Tax. 313, 339, 2d ed., 1 Desty, Tax.,

Leading Cases.—125. Moser.

§ 114. See *sub*, Piper: 114; Rushton: 5; Bro. Max. 4; Case: 47.

What ought to be of record must be proved by record and by the right record. Welty, Assess. 279, 283; Martin, 140 U. S. 634; Walker: 116. See DUE PROCESS OF LAW.

One claiming a sequestration must prove it. Deputron: 121; Williamson: 65; Iverslie: 46; Martin; Horan: 85.

The power to tax is the power to destroy. M'Culloch: 147; Collector: 148. From this maxim may be seen the necessity of authority, and of the record, and of its essentiality to prove compliance with law, and the various mandatory steps required. Iverslie: 46.

126. MARX v. HANTHORN (1893), 148 U. S. 172 (37 L. ed. 410), 1 Fost. Fed. Prac. 97; 2 Cool. Tax. 1007, *q.v.*

Taxation should be exact. Wiebold: 98.

Proceedings in, must be certain. Lawrence: 132; Tilton; Bloom: 266.

Tax deeds. 3 Dev. Deeds, 1347-1424; Keane; Russell v. Mann; Tilton.

127. NIXON v. RUPLE (1862), 30 N. J. Law, 58-61, 2 Cool. Tax. 1393. Brown, Jurisdic.

Cited, § 98, Hughes' Proc.

"All parties are bound to take notice of the day appointed by law for the meeting of the commissioners of appeal in cases of taxation; but if the commissioners meet at any other time than that appointed by law, such meeting must be upon notice, and must also be at the place of holding the town meeting, in order to obtain jurisdiction of the assessor, and they cannot, therefore, without such notice, alter his assessment." 1 Gr. Ev. 19.

"The tribunal of the commissioners of appeal is a special tribunal, and it is well settled that such tribunals should show upon the face of their record all facts necessary to give jurisdiction."

"What ought to be of record must be proved by record." Iverslie: 46; 180 U. S. 28, 471, 533.

Nixon stated: The town had raised the dog tax from 50 cents to $3, as it might do upon a vote. (Its record did not show this vote, and in a direct proceeding to test the tax it would have been held void, but otherwise collaterally.) Ruple was taxed $3 on his dog. On his application, the commissioners of appeal had set this aside, but without proper notice to the assessor, who must defend the validity of his assessments under penalties. Here the tax had been set aside as illegal without notice to one affected thereby. (See *Audi alteram partem.*) That such notice was given did not *affirmatively* appear from the record, and therefore it was the same as if none had been given. *De non apparentibus*, etc. Runkle; 1 Cool. Tax. 324-333 (right to notice), 624-633 (right to a hearing).

"Here it does not appear that the commissioners met, either at the right place, or gave any notice of the time of meeting. The only remaining question is, is it necessary that it should appear upon the transcript? The tribunal of the commissioners of appeal is a special tribunal, and it is well settled that all such tribunals should show all jurisdictional facts upon the face of the record." Carron v. Martin (1857), 26 N. J. L. 594, 69 Am. Dec. 584, n., 1 Cool. Tax. 466, 2 *id.* 1405 (liberal rule to uphold a tax). Cited, Dill., Beach. Pub. Corp., Brown, Jurisdic., Hanna v. Chase: cases; Andes, 158 U. S. 312: cases.

It should be observed that in Nixon the defense was by an officer under regular process. (Savacool: 164.) This defense is larger than it would be against the claimant of the right—the recipient of the tax. The defense of the officer is broader than for others.

In Carron land had been sold under a tax for widening a street; this the council might order upon the application—petition—of a certain number of land owners. The council had power to open and alter streets, and therefore jurisdiction of subject-matter generally. But the condition precedent—the application of the land-owners—did not appear of record. The contention was that the proceedings were *coram non judice*, and as such were open to collateral attack. *Omnia præsumuntur rite*, etc., applied. The tax was sustained by a divided court to uphold the tax exactly as if it were the proceedings of a superior court acting according to the course of the common law.

Many cases emphasize the fact that the proceedings are singularly distinctive where the inferior and statutory tribunal is involved; when there is no difference in the rules of construction they apply. The only question is, does the maxim last cited apply or not? See Crepps, Smith, Lead. Cases.

The *ratio decidendi* in Carron sustains the view that pleadings can be waived, which is so opposed to Munday. Waiving the omission of the petition was only an irregularity; it was not a fatal defect, as it would have been in a superior court. Rushton: cases.

In a superior court, the general demurrer searches the mandatory record and attaches to the first substantial fault. Hopper; McAllister. From this standpoint the defect in Nixon should be viewed. Those interested in titles to property should know its quality from the records. Ransom: 122.

Collateral attack assails all records from the same rationale and for the same ends and purposes. The answer to objections upon collateral attack should always be the same from the same condition. *Ubi eadem ratio ibi idem jus.*

128. HANNAH v. CHASE (1894), 4 N. Dak. 351, 50 Am. St. 656, n. Cited, §§ 78, 85, 110, 113, Hughes' Proc.; § 19, Gr. & Rud.

Hannah stated: Under a statute making it the duty of a sheriff to deliver to purchaser a deed to lands he has sold under execution sale, and the sheriff delivers his deed to such lands to a person other than the purchaser, it will not be presumed that

Leading Cases.—128. Hannah.

such grantee had succeeded to the rights of the purchaser, in the absence of proof to that effect. Hannah: cases; Whart. Ev. 1318; Miller, 56 N. Y. 383 (road overseers opening a road); Telfener, 70 Tex. 139 (tax title); Keane.

The presumptions of regularity never supply a jurisdictional fact. Walker: 118; Piper: 114; Cruikshank; Rice v. Travis. *Contra:* Harvey: 123; Leonard, 117 Mo. 103, 38 Am. St. 646, n. (liberal rule); Nixon: cases; Hahn v. Kelley; *Omnia præsumuntur rite,* etc. Clark v. Sires. See Harrow.

Proof must be certain; facts will not be presumed. Citizens R. R.: 186.

Omnia præsumuntur rite, etc. See Crepps; Piper; Cruikshank.

Instruments are in favor of jurisdiction of inferior tribunals. Leonard, 117 Mo. 103, 38 Am. St. 646, n., Bowman, 102 Ill. 472, Tucker, 130 Ind. 514. Hahn; Ell. App. 717. Leonard denies Nixon.

Presumptions of regularity. 2 Cool. Tax. 922-926 (what ought to be of record must be proved by record).

129. NELSON v. ROCKWELL (1853), 14 Ill. 375. Cited, § 129. Equity will enjoin a void judgment, although one might have appealed. Attempting to appeal will not bar relief. Process must be actually served in a justice's court; appearance cannot be entered by letter or by attorney. The right record must be made, as in case of infants. Nelson.

Statutory tribunals are strictly judged. Board, etc., 9 Colo. App. 526, Brown, Ex parte; Wooters, 137 Ill. 113; Walker; Crepps: 113.

A plaintiff is charged with the perfection of a foundation for a judgment. Walker: 118.

130. WHITE v. WAGAR (1900), 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60, affg. 83 Ill. Ap. 592.

Cited, §§ 16, 17, 18, 19, 27, Hughes' Proc.; §§ 99, 152, Gr. & Rud.

Construction—Noscitur a sociis. Labels and trade-marks are not the subject of forgery at common law or by statute, and hence are not forged instruments within the Code, div. 8, c. 38, § 2, providing that a justice of the peace may issue a search-warrant for forged bond notes.

Search-warrant: Expressio unius, etc.: *void warrant.* Under Civil Code, div. 8, c. 38, § 3, providing that a search-warrant shall direct the officer to bring the property and the person in whose possession it is found to the justice issuing the warrant, where a warrant failed to direct the bringing in of the person, the proceeding was illegal and void, though the person appeared. *Quod ab initio,* etc.: Sanborn; 1 Bish. Crim. Proc. 243.

Certiorari will lie to review the action of a justice of the peace in illegally issuing a search-warrant, though defendant also had a remedy by appeal. *Search-warrants;* strict *rules of pleading* required. Semayne's Case.

Leading Cases.—

131. P. EX REL. ATTORNEY GENERAL v. BROWN (1897), 23 Colo. 425.

Conclusions of law and their denials are nullities. Insurance Co., 24 Colo. 220, 221; S. C. 7 Colo. App. 221; Smelting Co. 23 Colo. 523; Robinson Mining Co.: 16; J'Anson: 91: cases, Watson, 9 Colo. 200; Gale, 11 Colo. 540; Pueblo County; *Cf.* Hume; Colo. cases.

Jurisdictional facts must affirmatively appear. (Overruling Liss, 2 Colo. 85.) Record essential for taxation. Rustin v. Merchant's Bk. (Colo.).

132. LAWRENCE v. FAST (1858), 20 Ill. 338, 71 Am. Dec. 274, n.; Welty, Assess. 225, 20 Colo. 384, 1 Cool. Tax. 845, 896, 759 (omission of dollar mark).

Cited, §§ 109, 186, 224, 243, Hughes' Proc.

Certainty essential for "due process of law" in all sequestration and condemnation proceedings. Figures expressing a valuation, thus: "2, 48," in an assessment roll, without words or characters to indicate what they stand for, whether eagles, dollars, dimes, cents, or mills, is void for uncertainty. Lawrence; Tilton; Welty, Assess. 225; 1 Cool. Tax. 759: cases. And lands described must be as certain as is required in a deed. "196, 008, 99 acres," in gross, without any other designation or description of the same, is void for uncertainty. Tilton. The assessment roll is the foundation of a tax and it must be certain to support a warrant and a tax deed. The assessor or other constitutional officer (P. v. Hastings) must make three things certain, namely, the name of the taxpayer, if known, his property and its valuation. Statutes and decisions that deny the above are opposed to certainty and what relates to the division of state power. Those things must be strictly observed for protection—the public welfare. See Bro. Max. 4: cases; MAGNA CHARTA; Power, 3 N. Dak. 107, 44 Am. St. 511-526, n.; 21 L. R. A. 328 (description of property must be certain; instructive case); Tracy, 38 Fed. 69, 13 Sawyer, 2 L. R. A. 733, n. (owner's name essential); Welty, Assess. 60-79; Keane (a tax deed must be certain).

Judgments must be certain. Freem. Judg. 48; 1 Black, Judg. 118; 1 Suth. Dam. 467; 2 Best, Ev.; Runkle v. U. S.; 2 Cool. Tax. 926. See JUDGMENT.

Every tax must be supported by a valid assessment roll. Welty, Assess. 3. And it must be in the required form. *Id.* 230-236; 1 Blackw. Tax Titles, 223-250; Welty, Assess. 80-96, 220-225; 1 Cool. Tax. 596-598.

"Due process of law"—constructive notice,—these conserving principles of procedure are strictly guarded in taxation law. Taxation statutes are construed like penal statutes. Marx; 2 Kent. 333, 344; End. Stat. 329-356; Bro. Max. 4: cases; Deputron: 121.

Description of property must be certain. A tax cannot be enforced against other property. Wap. Proceed. Rem. 232; Rich-

Leading Cases.—132. Lawrence.

ards v. Com. (1894), 40 Neb. 45, 42 Am. St. 650; Welty, Assess. 220-225; *Debile fundamentum.*

If, after a tax is imposed, it was provided that a personal judgment might be obtained for it, then this "adjective" law would affect substantial rights. Curative statutes cannot affect the higher policies involved. P. v. Seymour. *De minimis,* etc.

Wherever constructive notice is involved it is strictly guarded and construed against. If any essential link is insufficient, the chain parts and all affected by or charged with notice are dismissed until new notice is given according to law. Taxation proceedings are viewed as are those to give notice by publication. Pennoyer. They must be certain, and no less so than in judicial proceedings. Jurisdictional facts must affirmatively appear, and not be argumentatively inferred. Runkle. Otherwise it would be just as well to dispense with the requirements of records and for the participation of various officials representing the different departments of state power. 1 Cool. Tax. 545, 601, 741, 748, 926.

All of the foregoing observations are greatly in conflict in several states. It would exceed the province of this work to dwell upon the conflict, which shows that what we hint at is greatly misunderstood in many quarters.

133. TILTON v. R. R. (1874), 3 Sawyer, 22; Welty, Assess. 225; Cool. Tax. 759.

Cited, §§ 49, 104, 105, 186, 190, 224, 243, 314, Hughes' Proc.

Description of owner of property, and of valuation, must be certain. Tilton. Description of lands must be certain. Tilton; Keane; Woods v. Freeman; Stout; Chestnut, 64 Ark. 580, 62 Am. St. 213, n.; Sherman: 305. Officers liable for proceeding upon void descriptions. Atwell, 26 Mich. 118; Stetson.

134. RUSTIN v. MERCHANTS', ETC., CO. (1896), 23 Colo. 35; Cool. Tax. 919, 936, 937.

An affidavit for publication of notice of sale for taxes must appear of record.

Taxation; best evidence required. "What ought to be of record must be proved by record." Bro. Max. 4; Cool. Tax. 313, 339, 2d ed., New. Eject. 142, *sub,* Piper; Martin, 140 U. S. 634. Facts to sustain a tax must affirmatively appear of record. Iverslie; 1 Dest. Tax., § 114: cases; Moser: 125 (there can be no oral levy and collection of a tax). And likewise a judgment. Rushton. Evidence; exclusive evidence; corporation books; what they must show, is conclusive. 1 Dill. Mun. Corp. 300; Iverslie: 46.

135. BRISTOW v. WRIGHT (1781), Doug. (Eng.) 665, 1 Term Rep. (D. & E.) 238, 1 Sm. L. C. 1417-1444, ext. n. (8th ed.), omitted in 9th, 10th, and 11th eds., 1 Gr. Ev. 60-65. Dunlap, 105 Mo. Ap. 1, 5, 7.

Cited, pp. 17-19, 28-30; §§ 5, 5*a*, 8, 15-19,

Leading Cases.—135. Bristow.

22, 23, 29, 47, 134, 143, 181, 183, 186, 191, 245, 251, 255, 260, 268, 270, 271, 273, 321, 335, 350, Hughes' Proc.

Cited, §§ 11, 76, 91, 108, 111, 113, 118, 119, 142-144, 159, 162, 167*a*, 175, 232, 271, 272, 278, Gr. & Rud.

Bristow v. Wright stated: In an action against a sheriff for taking goods without leaving a year's rent, the plaintiff described himself as a yearly tenant, paying rent *quarterly.* But it was proved that the rent was payable *yearly,* and this was held a fatal variance because it was descriptive.

S. P. Wabash R. R.; Eddy Co.; Guedel; Gridley, 68 Ill. 47, Bliss, Pl. 215, stating Dickensheets, 28 Ind. 251; McClelland, 3 Texas, 210 (a somewhat liberal rule followed); Colorado Fuel, 8 Colo. Ap. 541 (*allegata et probata* must correspond; variance waived, if not objected to.) See Thomas: 15, for Colorado cases. Sault v. P. (1893), 3 Colo. Ap. 502, Pom. 553, 554; Garland: 160 (irrelevant evidence incompetent; Shutte: 291); Southwick v. Bank (1881), 84 N. Y. 420, 428, 429; Adams v. Gill.

Descriptive averments must be proved as laid. 1 Bouv. Dic. 982 (immaterial averment); Rushton: cases; Haupt v. S. (1899), 108 Ga. 53, 76 Am. St. 19, n., 1 Ev. 63.

Bristow is a part of *Expressio unius,* etc., so often cited, and it well expresses *Verba generalia restringuntur,* etc. Dunlap v. Kelley, 105 Mo. Ap. 1, and also that rule of construction, that no gathering of words can have more than one true meaning, elsewhere noted, and sometimes one phase of Dovaston; and it may be considered with Rushton. It is cited in 1 Gr. Ev. 60-65, Chit. Pl. And. Steph. Pl. B. v. W. is a corollary of Rushton which is reaffirmed in codes (Eddy Co.), for if a matter must be described, then it follows that all others are excluded. This is basic, as elsewhere observed. See Dickson v. Cole.

Bristow is often denied, and especially in text-books. And. Dic. 50, Maxw. Pl. 568-572 (quoting English practice act and also code provision); Phillips, Pl. 379, 520.

Very plain code provisions are often construed to abrogate the high and necessary rationale of Bristow. See Codes. *Actore non probante reus absolvitur* is a maxim from which much may be deduced. This maxim is but a corollary of *De non apparentibus, etc.* The stability of law—of all its branches—depends upon a right application of those maxims. Still they are denied. See THEORY OF THE CASE; J'Anson.

Variance is waived if not objected to. A party must aptly object; he cannot acquiesce in error in a trial court and then raise objections on appeal. Dorn; Colfax, etc. Co., 118 Cal. 648, 40 L. R. A. 78. See Shutte: 291: cases; *Consensus tollit errorem.*

Leading Cases.—135. Bristow.

The rule in Bristow upheld in Bissell, 19 Johns. 66 (production of a note for $300 will not prove a note described as for $180). Robertson (1821), 18 Johns. 451 (one cannot sue on a *quantum meruit* to recover upon an express contract. Cutter).

There shall be no departure is a fundamen- §§ 162, 182, 205, Gr. & Rud.

There shall be no departure is a fundamental rule of pleadings. Lang v. Metzger, 206 Ill. 475, 488 (very strict rule in equity); Sto. Pl. 10; Borkenhagen: 81. Requirements of appellate procedure, collateral attack, *res adjudicata*, "due process of law," removal of causes and constructive notice depend on certainty. The continuity and certainty of jurisdiction, and a congruous theory of it, from the investing of a court with it by the pleadings to and including the tests of the validity of a record upon collateral attack, depends upon respect for the rule in Bristow. In other words, a certain and definite theory of procedure—the stability of the due administration of justice—depends upon it. Argument for intermittent and fluctuating jurisdiction is inadmissible. Causes of action cannot be first made to appear from answers or replies matters of the mandatory record and *a fortiori* never from the bill of exceptions. The functions of pleadings for constructive notice (Windsor), forbid that view. The cause of action described in the indictment, information bill, complaint, petition, declaration, libel, state of claim, is the one the court must confine itself to. It is usurpation—abuse of power—to assume any other, or to exercise judicial power upon any other. Protection from usurpation depends upon the commonplace rule, "there shall be no departure." This is a great bulwark against oppression. Courts cannot begin with jurisdiction of one thing, and, while proceeding with that, substitute something else, and adjudicate that; for their shall be no departure. From the ends of the conserving principles of procedure the reason for the rule, "there shall be no departure," is discoverable. Further, that rule may be traced from another one—that the general demurrer searches the whole record and attaches to the first fault; also rules relating to the functions of answers and replies, and bills of exceptions.

It cannot be admitted that statutes can abolish the rules in question. The conserving principles cannot be abrogated. The Judicature Act of England expressly provides against departures—variances.

Federal procedure denounces variances, as may be deduced from Shutte: 291 and those cases which hold that where there is no *allegata* there can be no *probata*. A court is bound by its record; it can only hear and adjudicate the matter presented by the record, and the right record made at the right time, by the right hand

Leading Cases.—135. Bristow.

(division of state power), in the right way. The theory of the case must be within and be consistent with the pleadings; these cannot be overridden and abrogated by rules of construction. Saunderson (Wis.); *Quod ab initia*, etc.

Statutes cannot abolish variances. Frustra probatur, etc. §§ 19-21: Hughes' Proc. Rushton: 5: cases; Shutte: 291: cases.

One cannot allege a special contract and recover upon an implied one. Davis v. Chase (1902), 159 Ind. 242, 95 Am. St. 294; Cutter: 308; Robertson. 18 Johns. 451.

Proof of ordinary negligence will not support a charge of gross. King v. R. R. 205; Rideout; Guedell: 74*a*.

When the same transaction involves both a contract and a tort, then the pleading upon neither one phase or the other is sufficient. Kelley v. R. R. (1895), 1 Q. B. L. R. 944.

136. EDDY CO. v. BLACKBURN (1895), 70 Fed. 949, 17 C. C. A. 532, 30 U. S. App. 571.

Cited, p. 30; §§ 8, 17, 19, 22, 29, 41, 78, 79, 186, 240, 245, 251, 260, 268, Hughes' Proc.

Cited, §§ 113, 118, 119, 159, 205, 232, 278, Gr. & Rud.

Eddy Co. stated: Allegata et probata must correspond. Although under modern systems of pleadings, courts of law, where their remedies are inadequate, may enforce equitable rights, it is stringently required that the proof must agree with and support the pleadings. The rule of the common law is essential for the conserving principles of procedure. Bristow. And within the grounds alleged and relied on to obtain it. Rushton; Starbuck: 263; Dovaston. Technicalities about *allegata et probata* are essential. *Actore*, etc.

Codes do not abolish essential technicalities —safeguards of the law. Eddy Co. *De non apparentibus*, etc. *Frustra probatur.*

Issues should be clear and defined. Gay.

A court is bound by its record. It can pass on no subject not presented by the pleadings. Evidence will not do for pleadings; these only confer power to adjudicate. Gentry. *Frustra probatur*, etc.

136a. PERRY v. PORTER (1878), 124 Mass. 338-342. Criticised, 17 Green Bag, 8 (Melville M. Bigelow). § 245, Hughes' Proc. Cited, §§ 108, 118, 272, 278, Gr. & Rud.

Defamation; slander; Allegata et probata must correspond. The words charged must be proved as laid. Larceny is not deception and fraud; proof of the latter words will not sustain the charge of thief.

The charge that the words were spoken to the trustees of a corporation to prevent their support of plaintiff for an office, is not supported by proof of communication with one of those trustees, in the absence of evidence showing they were spoken to him as a trustee for such purpose. One trustee is not all.

The wrong must be proved as laid. 124 Mass. 340; Bristow v. Wright; *Frustra*

Leading Cases.—136a. Perry.

probatur, etc.; Relevancy of evidence. See VARIANCE.

Allegata et probata must agree. Fish v. Cleland (no *allegata*, no *probata*); Lloyd v. Karnes (1867), 45 Ill. 62, 70: cases (same at law and in equity); Heath v. Hall (1871), 60 Ill. 344, 350: cases; Adams v. Gill: cases; Lockhart v. Leeds (1904), 195 U. S. 427 (liberal rule); *contra* cases cited *id.*, p. 432; Harrison v. Nixon, *sub*, Garland.

137. WABASH R. R. v. FRIEDMAN (1892), 146 Ill. 583, 30 N. E. 353. S. P. Bristow. *Allegata et probata* must correspond. Instructive case. Eddy Co., 206 Ill. 488.

Cited, p. 30; Hughes' Proc.

Cited, §§ 113, 118, 143, 159, 205, 272, 278, Gr. & Rud.

Variance is waived if not objected to. Dorn; Guedel. (*Consensus tollit errorem.*)

138. GAY v. WINTER (1867), 34 Cal. 153. Courts should define issues and have them made certain. See GENERAL ISSUE. Bates: 225; P. v. Ryder (1855), 12 N. Y. 433. Kollock. See 32 Colo. 51.

Cited, §§ 12, 39, 41, 82, 95, 145, 251, Hughes' Proc.; § 272, Gr. & Rud.

In the proceedings before Festus and Agrippa appears how the scribes and pharisees were instructed of the manner of the Romans, and how the conclusion of law was a nullity; what must be alleged and what proof was required, and that pleadings were to limit the issues and to narrow the proofs. Kollock. A government of protection and of mercy could be constructed. See p. 11, Gr. & Rud.

Bills of particulars may be ordered. Cryps.

Notice to produce a document need not be given, if it is admitted. Consequently it is important to know what is admitted. See ADMISSIONS; DENIALS; Kollock.

139. WALDEN v. BODLEY (1840), 14 Pet. 156, 164 (10 L. ed. 398, 402).

Limitations of the right to amend. Amendments cannot be made to affect the uses of records for protection—for constructive notice. Wooters, *sub*, Crepps; Codington v. Mott (1862), 1 McCarter (N. J.), 430, 82 Am. Dec. 258; Bliss, Pl. 428-431; Sto. Pl. 892-905; Gentry. See WAIVER. Limitations of the right to amend indictments. R. v. Naylor; Owen v. Weston.

From the dominating principles of procedure the limitations of the right to amend are discoverable. Gates, 117 Wis. 170; Francisco: *id.* 242 (Wisconsin rule of limitation); 205 U. S. 141.

140. WHITE v. LYONS (1871), 42 Cal. 279. A prayer to a complaint limits the recovery. *Sub*, Hood; Russell v. Shurtleff. Cited, §§ 268, 321, Hughes' Proc.

A general prayer sufficient. Fost. Fed. Prac. 83. Codes require a prayer—demand for damages. The forms of the law are a part of the law. However, the omission of them may be waived, and if waived the formal defect is cured. It is the statement of the pleading that gives the court authority—jurisdiction. See JURISDICTION. Those cases holding that a jurisdiction conferred by the statement is afterward

Leading Cases.—140. White.

divested by the non action of a defendant, because a prayer was omitted, concede too much to statutes and codes. See 2 Suth. Dam. 415: cases; Russell. *Ad damnum.*

141. HOOD v. SUDDERTH (1892), 111 N. C. 215, 47 Alb. Law Jour. 91, 16 S. Rep. 397; 4 Suth. Dam. 1282 (Seduction), *id.* 1281-1285.

Seduction. Adult woman may sue for, when induced by fraud. Promise to marry and solicitations to consent because the parties were just the same as husband and wife, and soon would be, is fraud. Hood. See Hegarty; *Volenti.* Who may sue for. 4 Shutte Dam. 1282.

Prayer; remedy. Any remedy may be afforded consistent with the facts of a case, whether *demanded* in the complaint—in the prayer—or not. White; Davidson, 143 Ill. 139, 36 Am. St. 367, n.; Metcalf v. Hart (1891), 3 Wyo. 513, 31 Am. St. 122. See Russell v. Shurtleff (Colo).

If a complaint is uncertain as to whether in tort or contract, a plaintiff may elect. Whitney: 112; Bliss, Pl. 119, n.; Hood.

142. MARBURY v. MADISON (1803), 1 Cranch (U. S.), 137, 174, 1 Curtis, Dec. 368 (2 L. ed. 61), Boyd, Const. Cas. 17, 1 Thayer, Const. Cas. 107, McClain, Const. Cas. 766-768, Brown, Jurisdic.; § 8, also Hughes' Conts. 8 Cyc. 726.

Cited, pp. 12, 20, 34; §§ 9, 28, 31, 33, 65, 66, 186, 213, Hughes' Proc.

Cited, §§ 12, 33, 60, 62, 79, 87, 96, 110, 147, 239, 240, 248, 261, 267-268, 279, Gr. & Rud.

Judicial power vested by a constitution cannot be divested by lesser laws—statutes. Blake. A notary public cannot punish for contempt, not having judicial power. Huron, 58 Kan. 152, 62 Am. St. 614, n.; Flournoy; P. v. Maynard; Suth. Stat. 570.

Appellate jurisdiction vested by a constitution cannot be otherwise vested by a statute. Allen, 122 Mich. 324, 80 Am. St. 573, n.; Haight, 8 Cal. 297, 68 Am. Dec. 323; Canby, 167 Ill. 628 (when a constitution vests jurisdiction, legislatures cannot divest it. P. v. Hastings); U. S. v. Shipp, 203 U. S. *In præsentia majoris cessat potentia minoris; Expressio unius.*

"Courts of appellate jurisdiction only" will review only questions first passed upon by a trial court. Lane v. Dorman. Green, 50 S. C. 514 (general demurrer not raised in lower courts is waived), 62 Am. St. 846, note 63 Am. St. 910; O'Brien, 101 Iowa, 40, 63 Am. St. 368; Rushton; Campbell: 2*a*.

A question not raised at the trial will not be considered for the first time on appeal, Green, *supra;* Reich, 151 N. Y. 122, 56 Am. St. 607, n.; Lough: 291; Zang, 25 Colo. 551, 71 Am. St. 145; Williamson, 54 S. C. 582, 71 Am. St. 822.

Cases will be reviewed by the appellate court only upon points and theories presented to the trial courts. Rivard, 109 Mich. 98, 63 Am. St. 566; Garland v. Wholebau; Lough; 1 Black, Judg. 242. See THEORY OF THE CASE. *Consensus tollit errorem.*

Leading Cases.—142. Marbury.

Courts are bound by their records. Houston; Horan; Cohens; Iverslie: 46. *Fabula non judicium.*

Departures there cannot be. See *Id.*: CONTINUITY; VARIANCE: Bristow.

There is no wrong without a remedy. Marbury; *Ubi jus,* etc. "The government of the United States is a government of laws and not of men." Marbury.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

The constitution gave to the supreme court original jurisdiction of ambassadors, consuls, public ministers, and where states are parties, and appellate jurisdiction in all other cases. To this enumeration applies *Expressio unius,* etc. Therefore, congress cannot augment the original jurisdiction by additions of other subject-matter. The constitutional enumeration is exclusive. To this point Marbury is widely cited. Nor can its powers be diminished, U. S. v. Shipp, 203 U. S.

143. P. v. MAYNARD (1853), 14 Ill. 419, Brown, Jurisdic. 14; Mech. Pub. Off. 514 (jurisdiction vested by a constitution is exclusive); Marbury; Allen, 122 Mich. 324, 80 Am. St. 573, n.; Suth. Stat. 395. See Hastings: 144.

Cited, §§ 31, 32, 186, Hughes' Proc.

Cited, §§ 60, 239, 240, 268, Gr. & Rud.

144. P. v. HASTINGS (1866), 29 Cal. 449, Brown, Jurisdic. Only the constitutional officer, if so named, can assess. Division of state power. Winona Case: P. v. Maynard; *Expressio unius,* etc. Judicial functions cannot be delegated. Van Slyke. Assessment must be *bona fide* made, and by the proper officer. Tampa, 39 Fla. 683, 63 Am. St. 202, n.: cases. See Welty on Assessments.

Cited, §§ 31, 151, 314, Hughes' Proc.

Official functions cannot be delegated nor contracted away. See ULTRA VIRES; P. v. Hastings; CONSTITUTIONALISM.

Cited, §§ 60, 135, 239, 240, 268, 274, Gr. & Rud.

145. DENNETT, PETITIONER (1851), 32 Me. 508, 54 Am. Dec. 602-604, n.; Brown, Jurisdic. Cited, §§ 28, 31, 66, 67, 99, 101, 151, 166, 167, 186*a,* 191, 205, 214*a,* 243, 304, Hughes' Proc.

Cited, §§ 48, 63, 96, 136, 177, 237, 238, 268, Gr. & Rud.

Division of state power. Nos. 47, 48, 66, 70, 73, 75, 78, 81, The Federalist; Flournoy: cases; Merrill, 1 N. H. 199, 209, 8 Am. Dec. 52; Cool. Const. Lim. 109, n., 6th ed., Suth. Stat. 6, 11, 164, 206; Mississippi v. Johnson (1866), 4 Wall. 475, (18 L. ed. 437, n.); Thayer, Const. Cas. 196; Suth. Stat. 2; Burton v. U. S.

Judges can exercise judicial power only. Norwalk, 69 Conn. 576, 39 L. R. A. 794: cases.

Judges cannot be made to discharge duties foreign to their office. Board, etc., 97 Md. 247, 62 L. R. A. 809.

Leading Cases.—145. Dennett.

Officers of each department of state are equally bound by demands for a record. Requirements for records are mandatory upon all alike. Starbuck: 263. See CONSTITUTIONALISM. A solicitor of the treasury can issue an execution. Murray: 219, *sub.*

146. FLOURNOY v. CITY OF JEFFERSONVILLE (1861), 17 Ind. 169, 79 Am. Dec. 468-477, n.; cited, Mech. Ag. 592, 1 Dill. Corp. 481, 2 *id.* 813, 815. 1 Beach, 208, 678; Payton v. McQuown (1895), 97 Ky. 757, 53 Am. St. 437. See DIVISION OF STATE POWER. Cited, Hughes' Conts. Cited, §§ 70, 99, 100, 101, 151, 152, 165, 167, 178, 186, 214*a,* 243, 304, 339, Hughes' Proc.

Cited, §§ 60, 96, 134, 136, 177, 268, Gr. & Rud.

Ministerial and judicial acts distinguished. A ministerial act is one which a person performs under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to the exercise of his own judgment upon the propriety of the act being done. Flournoy; Dennett; Beach, Pub. Corp. 260, 2 Bailey, Jurisdic. 901.

A statute giving a clerk of a court power to fix the amount of bail is unconstitutional. Gregory v. S. (1883), 94 Ind. 384, 48 Am. Rep. 162-166; Adams v. S. (1900), 156 Ind. 596 (statute cannot encroach on the judiciary by making stenographer's transcript a bill of exceptions).

Entering a judgment in vacation by a clerk is judicial, and vitiates. Hall v. Marks (1864), 34 Ill. 358; De Chastellux; cited, Brown, Jurisdic.; Van Fleet, Coll. Att., § 803. Judicial power cannot be delegated. Van Slyke. But ministerial power can be delegated. A constable may appoint a deputy.

Power to grant an injunction is judicial, and a clerk empowered to grant cannot delegate the act. Payton, *supra.* A clerk cannot exercise judicial functions. Hall, *supra;* Gregory; Van Fleet, Coll. Att. 803. See P. v. Simon (1898), 176 Ill. 165, 68 Am. St. 175, n.

Rejection of a claim against a county by a board of county commissioners is not a judicial act, and is not *res adjudicata.* Board of, 12 Ind. Ap. 315, 54 Am. St. 528, n. *Authority of county commissioners.* Jones, 57 O. St. 189, 63 Am. St. 710, n.

Political and executive questions; martial law. See CONSTITUTIONAL LAW; Martin v. Mott (1827), 12 Wheat. 19, Milligan, 4 Wall. 2, 2 Thayer, Const. Cas. 2376; *Johnson v. Jones* (1867), 44 Ill. 142, 92 Am. Dec. 159; Luther v. Borden (1849), 7 How. 1; 1 Thayer, Const. Cas. 191; Mississippi Johnson, 4 Wall. 475.

Division of state power. Dennett: 145.

147. M'CULLOCH v. MARYLAND (1819), 4 Wheat. (U. S.), 316, 4 Curt. 415 (4 L. ed. 579), 199 U. S. 469. 201 U. S. 255. Gt. Opin. Gt. Judges, 267, Marshall Const. Dec., Thayer, Const. Cas. 271, Boyd, Const. Law, 32-40, 308-323;

Leading Cases.—147. M'Culloch.

McClain, Const. Cas. 1-13, Brown, Jurisdic.; Overshiner v. S. (1901), 156 Ind. 187, 59 N. E. 468, 83 Am. St. 187; *Expressio eorum*, etc.; Martin v. Hunter's Lessee; Logan v. U. S.; Neagle, *In re*. Cited, Hughes' Conts., 190 U. S. 259.

Cited, pp. 8, 9, 20, 33, 34; §§ 1, 6, 9, 10, 12, 13, 16, 17, 20, 21, 26, 28, 45, 76, 100, 169*a*, 186*a*, 203, 206, 214*a*, 268, 271, 275, 278, 291, Hughes' Proc.

Cited, Preface; §§ 5, 33, 46-48, 78-80, 86, 116, 126, 137, 138, 147, 151, 207, 213, 263, 266-268, 297, Gr. & Rud.

M'Culloch is a truly great case upon construction, and the application of the maxim *Expressio eorum*, etc. Because of this it is called a great constitutional case. It is so often referred to it should be well understood.

"The power to tax is the power to destroy."

M'Culloch stated: Maryland proceeded to tax a branch bank of the U. S. within that state. This tax was resisted by its manager, M'Culloch; and the question whether or not a state could tax a federal agency was carried before the highest tribunal, where Marshall spoke for the court, holding *that a principal thing carries its incidents, and that upon incidental things a principal thing depends;* that the U. S. can establish a bank as an incident of the government, and that the power to tax is the power to destroy; and that if states can tax federal agencies, then they can destroy them. *M'Culloch* should be read with the *Martin, Cohens, Tarble, Collector, Gibbons, Neagle,* and *Logan* cases. They are full and replete with instruction of the polity of the federal government.

"Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter of the constitution are constitutional."

A principal thing carries with it its incidents. Suth. Stat. 340, 341. *Expressio eorum*, etc., Max. No. 14, §§ 203-209, Hughes' Proc.

Constitutions deal with general terms, not codes and details. Murray's: 219. *Lex non exacte; cujus est.*

147a. FURMAN v. NICHOLS (1869), 8 Wall. (U. S.), 44 (19 L. ed. 370), 2 Fost. Fed. Prac. 500 (writs of error to state courts).

Cited, §§ 34, 175-177, Hughes' Proc.

The mandatory record must disclose a federal question. It is not sufficient that it appears from the statutory record, or any part of it, or by evidence *aliunde*, or from *dicta*.

The mandatory record must disclose a federal question. L. & N. R., 166 U. S. 709; Covington Turnpike Co. v. Sandford; Howard v. Fleming; Carstairs v. Cochran (1904), 193 U. S. 10.

Federal question: how it must be made to appear. 2 Fost. Fed. Prac. 500 (p. 1186), 180 U. S. 187. See *Federal*.

Opinion of state court may be examined.

Leading Cases.—147a. Furman.

Loeb, 179 U. S. 473; 2 Fost. Fed. Prac. 500 (p. 1186). But opinions cannot supply facts that should appear in the mandatory record. This kind of aider is not recognized. Loeb, *supra*.

Where one could or might raise a federal question, he should, and also except; also show these facts of record. 2 Fost. Fed. Prac. 500 (p. 1186): cases; Winona Case.

The mandatory record is essential for the exercise of the appellate power of the supreme court of the United States. For this is an implication; it is required by the supreme laws of the land; it cannot be waived. §§ 10-12, Hughes' Proc.

For the exercise of principal powers, essential incidents will be implied. For these a liberal construction is recognized. M'Culloch. The federal question or the character of the defendant must appear from the complaint. O. S. L. R. R. v. Skottowe (1895), 162 U. S. 490, 494. See FEDERAL.

148. COLLECTOR v. DAY (1870), 11 Wall. (U. S.) 113 (20 L. ed. 122): stated, 190 U. S. 256, Cool. Const. Lim. 592; cited, 2 Dill. Corp. 775, 1 Cool. Tax. 133; 2 *id.* 1119; 199 U. S. 466.

The federal government cannot tax state agencies. A United States revenue collector assessed Probate Judge Day, of Massachusetts, $61.50 upon his salary for the years 1866 and 1867. Day's salary was fixed by law and payable out of the treasury of the state. He paid the tax under protest and brought suit to recover it. (U. P. R. R. v. Dodge Co.) *Held*, recoverable. The national government cannot tax state agencies, and *e converso*. Marshall's maxim in M'Culloch was that "the power to tax involves the power to destroy." 11 Wall. 127; 190 U. S. 259.

In Collector, M'Culloch, Weston v. Charleston (1829), 2 Pet. 449, Dobbins, 16 Pet., Veazie, 8 Wall. 533 (relating to taxation), are stated, reviewed and affirmed.

"The general government in the states, although both exist within the same territorial limits, are separate and distinct sovereigns, acting separately and independently of each other within their respective spheres. Ableman; Cool. Const. Lim. 11; Tarble's Case. The former in its appropriate sphere is supreme; but the states, within the limits of their powers, if not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states." Collector; Cruikshank; Suth. Stat. 21: cases.

The relations existing between the two governments. Ableman; Lane County, 7 Wall. 71, 76; Tarble's Case; Cohens; Martin.

Taxation. The United States cannot tax state's agencies. "The power to tax is the power to destroy." M'Culloch; 190 U. S. 256. *Exemptions of governmental agencies from taxation.* 1 Cool. Tax. 129-134.

The polity of the federal government

Leading Cases.—148. Collector.

must be understood by the practitioner. Cruikshank, 232; §§ 10-12, Hughes' Proc.

149. R. v. GIBSON (1806), 8 East (Eng.), 107, 111, 1 Lead. Crim. Cas. (B. & H.) 272-276: stated, 4 Mews' E. C. L. 1758, 1771; 1 Bish. Cr. Proc. 739, Whart. Cr. Pl. & Pr. 429, 486.

Cited, §§ 15, 25, 195, 324, Hughes' Proc.

Pleas in abatement; misdemeanor; abatement; Respondeat ouster; final judgment. A defendant in an indictment for a misdemeanor cannot plead over to the charge, after a plea in abatement for a misnomer on which issue is taken and found against him. R. v. Gibson: *R. v. Duffy;* Rice v. Shute, 1 Sm. L. C. 1405-1417, omitted in 9th, 10th and 11th eds.; Williams v. Bankhead; Myers. See ABATEMENT.

150. MYERS v. ERWIN (1851), 20 Ohio 382, n.; cited, 1 Encyc. Pl. & Pr. 31: cases; Piquignot, 16 How. 104. See Mexican R. R. 149 U. S. 194; R. v. Shakespeare (1808), 10 East, 83; Marsh v. Smith (1846), 18 N. H. 366.

Cited, §§ 18, 324, Hughes' Proc.

Pleading; Pleas of abatement. An issue of fact joined on a plea of abatement, if decided for plaintiff, the judgment is *quod recuperet.* 1 Chitty Pl. 466; Gould, Pl. 300; Myers; Boggs, 23 Ill. 66; 1 Encyc. Pl. & Pr. 31; Mineral Point R. R., 32 Ill. 19; Googan, 62 Ill. 66; Greer, 126 Ill. 184, 191: cases. But see Steele, 20 Brad. (Ill.) 366; Also Steph. Pl. 392 (Tyl. ed.); R. v. Gibson; R. v. Duffy; Rice v. Shute.

The judgment on a plea of abatement is either:

1. That the writ of declaration be *quashed cassetur breve or narratio,* or,

2. Respondeat ouster, or,

3. Final, *quod recuperet.* 120 Ill. 181, cases justifying the common law consequences. 1 Encyc. Pl. & Pr. 31; R. v. Gibson. See ABATEMENT.

Judgment is rendered:

1. Without issue taken on the plea; or,

2. With issue.

Issues are either:

1. Issues in law, or,

2. Issues in fact.

Issues on pleas in abatement are:

1. Such as must be tried by the court, or,

2. Such as may be tried either by the court or jury.

The kind or form of judgment rendered on an issue upon a plea in abatement depends upon the question whether the issue be found:

1. For the plaintiff and against the plea, or,

2. For the defendant and in favor of the plea.

For distinctive results upon each of these phases, see note to 20 Ohio Rep. 387-389; 2 Gr. Ev. 27; Bouv. Dic.; ABATEMENT.

The rule in Myers v. Erwin is most important to be observed. It is conclusive in its consequences, and should be remembered. False and sham pleas were severely punished at common law. Graver: 103.

The verification of pleas in abatement are singularly strict and technical. See ABATEMENT, Hughes' Proc.

Leading Cases.—150. Myers.

151. BONESTEEL v. ORVIS (1868), 23 Wis. 506, 99 Am. Dec. 201, 203, n. Freem. Judg. 230.

Dilatory motions, if all of the same degree, must be presented at the same time. Kraner: 299; R. v. Gibson. A party is not permitted to divide up his objections or claims for relief by several motions (*Expressio unius,* etc.) when complete relief can be granted upon one, and all known objections or claims for relief against the irregularities not urged by the first motion are waived. Bonesteel. See *Consensus;* ABATEMENT. All that could or might have been heard is concluded. Kingston's Case; *Aurora v. West* (1888), 1 Whart. Ev. 782-788, 840, Bigl. Estop. 100, 153. See RES ADJUDICATA.

Res adjudicata; such motions are not, nor are interlocutory motions in practice. Chichester, *sub, Res adjudicata;* Freem. Judg. 325; 1 Van Fleet, For. Adj. 14-20.

A final judgment upon the merits essential for Res adjudicata. See *Id.* But motions in practice may be renewed by leave of court. Bonesteel; Bennett, 39 Mo. 152, 90 Am. Dec. 457. *Order of presenting dilatory pleas; table showing,* see ABATEMENT.

152. HARKNESS v. HYDE (1878), 98 U. S. 476 (26 L. ed. 237), 1 Fost. Fed. Prac. 101; Brown, Jurisdic.; 149 U. S. 209 (Mexican R. R. v. Pinkney).

One sued out of his jurisdiction may except, and after answer, trial and defeat, may have his abatement exception reviewed. Harkness; Lower, 9 So. Dak. 252, 62 Am. St. 865, n.; Jones, 108 N. Y. 415, 2 Am. St. 447, 2 Encyc. Pl. & Pr. 629, 630: cases; Brooks, 51 Fed. 138, stating and limiting Harkness.

Generally abatement matters are waived if the merits are pleaded to. See ABATEMENT.

Non-resident party may admit service of process in another state, and thus waive objections. Jones, 113 Mich. 433, 67 Am. St. 475, n.

If one removes his cause, participating in a trial is no waiver. Herryford, 42 Mo. 148, citing Bro. Max. 102.

153. CLYDE MATTOX v. U. S. (1892), 146 U. S. 140, 147. Cited, § 87, Hughes' Proc.; Cited, § 256, Gr. & Rud.

Discretion; refusal to open a record and be informed is ground for reversal, even of a discretionary matter. Windsor. Abuse of fundamental right violates high policies.

Abuse of power and denial of fundamental right, although relating to waivable matter, is material error, and is a ground of exception for review. 102 Am. St. 71.

154. WILSON v. U. S. (1893), 149 U. S. 60 (37 L. ed. 650). Cited, § 253.

Any act of commission or omission may be proved by a bill of exceptions, and it is the duty of a judge to give such, and to

Leading Cases.—154. Wilson.

aid in making such correct and true. Jelley, 50 Ind. 1. See ABATEMENT. Any and all acts, all things said and done, may be made of record by bill of exceptions. Wilson v. U. S. This is essential for the guaranty of review. "Courts of appellate jurisdiction only" should, and they sometimes do, protect this right.

155. VAIDEN v. C. (1855), 12 Gratt. 717, Horr. & Thomp. Cas. Self-defense, 222 (1 Crim. Def.) : Kerr, Hom. 167, 179.

Cited, §§ 12, 253, Hughes' Proc.

Vaiden stated: V. and his guest were at V.'s house drinking and playing cards. They fell out, and the latter started home, but, being angry and confused, was slow about this and was tarrying and swearing in the yard. He also returned to get his gun which he had left; this was handed him, and with it he started through the yard fence, when V. appeared, following him with his gun. This added coals to the fire and the altercation was renewed. V. was being clubbed with a gun when he shot and killed the deceased. But his defense was not perfect and he was convicted. P. v. Button (1895), 106 Cal. 628; 46 Am. St. 259, n.

Homicide; self-defense; necessity produced by slayer. Justification for killing must not arise out of prisoner's misconduct. The slayer must be without fault. *Volenti; Nullus commodum.* U. S. v. Holmes; Kerr, Hom. 179. Self-defense cases. Aldrich (killing destructive animals); Bird (defense against trespassers); C. v. Selfridge (self-defense: cases).

Probata must be sufficient, and be present in a record to sustain a conviction. S. v. Croteau; Ad quæstionem facti.

Bill of exceptions; Facts proved may be certified instead of evidence. Surplusagium non nocet; Utile per inutile non vitiatur. Prolixity is to be avoided in all pleadings, even in bills of exception. R. R. v. Stewart: 290*a*. Vain and fruitless things the law will compel no one to do: *Lex neminem cogit ad vana seu inutilia peragenda.* And. Dic. 616.

156. SMITH v. HODSON (1791), 4 Term Rep. (D. & E.) 211, 2 Sm. L. C. 124-139, ext. n., 11th ed. (reviews English cases); Keener, Sel. Conts. 206, 2 Mews' E. C. L. 855, 858, 917, Herm. Estop.; Whart. Ag., Huffc., 36, Reinh. 112, Sto. 250, 259. See ELECTION; *Allegans,* etc.

Cited, § 23, Hughes' Conts.

Cited, §§ 181, 184, 307, 344, Hughes' Proc.

Election of remedies. Terry; Kearney, 97 Iowa, 719, 50 Am. St. 434, n., Bliss, Pl. 11-19, Thomas v. Joslin (1886), 36 Minn. 1, 1 Am. St. 624.

If once made, is final and conclusive. Smith.

Choice between courts is equally conclusive. Field, 6 N. Dak. 424, 66 Am. St. 611; Jones v. Hoar (1827), 5 Pick. 285, n., stated in Terry; Bliss, Pl. 13 n., 154, 244.

One may waive a tort and sue in assumpsit, where goods have been converted and sold, was decided in Smith. Works on agency, torts and procedure extendedly notice this very important and instructive principle. Terry presents it. 2 Page Conts. 840-848.

If a bankrupt on the eve of his bankruptcy fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover; but if they bring assumpsit, they affirm the contract, and then the creditor may set off his debt. Smith.

Leading Cases.—156. Smith.

Allegans contraria non est audiendus. One cannot "blow hot and cold" at the same time. Smith; Terry; Connihan v. Thompson (1873), 111 Mass. 270: notes to Smith, Smith Lead. Cas.; Thomas, *supra;* Bradley, 149 Mass. 141, 3 L. R. A. 507; Kearney, *supra;* 7 Encyc. Pl. & Prac. 360-375.

Remedies; pursuit of one remedy, when an irrevocable election not to pursue another. Thomas, *supra;* Fowler, 113 N. Y. 450, 30 Am. St. 479-494, 4 L. R. A. 145 ext. n., Hahl v. Sugo (a case that attracts drastic mention).

Waiving torts. Webster, 5 Greenlf. (Me.) 319, 17 Am. Dec. 238-247, ext. n.; Jones v. Hoar (goods must be sold—but see Terry); Alderson, 45 Ill. 128, 8 Mor. Min. Rep. 526: cases, Pom. Rem. 110, 560: cases; 1 Wat. Tres. 569, 607-611: cases; Bish. Conts. 186; Downs, 58 Minn. 49 Am. St. 488, n.; Keener, Quasi Conts. 159-214; 2 Conts. 647: cases.

Commercial paper given for debt, if dishonored, holder may produce or return it and sue on original consideration. Sub, Tobey.

Property must be converted into money. Jones; Alderson, *supra;* 1 Wat. Tres. 569. *Contra:* Terry, Pom. Rem. 569: cases; Cool. Torts, 107: cases; Moak, Underh. Torts, 619: cases.

Common carrier may be sued upon contract or tort for injury occasioned. Baltimore Ry., 61 Md. 619, 48 Am. Rep. 134; Nevin, 106 Ill. 222; stated, Bur. Cas. Torts, 329; Brown v. C., M. & St. P. R. R.; Lough: 293; Bristow. *Contra:* Barker, 4 (largest immunity for tort of carrier). See Brown v. R. R.

Variance; failure of proof arising from suing in tort and proving in contract. Bristow: 135; Brugger: 162; Miller v. Hallock (1886), 9 Colo. 551.

Breach of contract, when a tort. If antecedent duty existed, a subsequent or cumulative contract does not make the wrong any the less a tort; otherwise if the initial duty was a contract. Russell, 87 Iowa, 233, 43 Am. St. 381.

Amendments; ex delicto actions cannot be changed to ex contractu. Neudecker, 81 N. Y. 296. See Pom. 110, 558, 560; Walden; AMENDMENTS. Election: actions *ex delicto* and *ex contractu.* Pom. Rem. 567-573, 2 Chit. Conts. 906.

An election once made is final and conclusive. Smith; 15 L. R. A. 693; 1 Add. Torts, 52; note, 38 Am. St. 620; Fowler, *supra;* Thomas, *supra;* Robb v. Voss, 155 U. S. 13; Connihan, *supra.*

Leading Cases.—156. Smith.

Commencing a suit with full knowledge of all the facts is an election. Conrow v. Little (1880), 115 N. Y. 387, 393, 5 L. R. A. 693; stated, 13 L. R. A. 91: cases; Crompton v. Beach (1892), 62 Conn. 25, 18 L. R. A. 187, n.; Dash: 237*a*.

Concurrent remedies may be pursued. Crossman, 127 N. Y. 34, 13 L. R. A. 91, n.: cases; Union Cent. Life Ins. Co., 130 Ind. 214, 15 L. R. A. 89, n.; Walden, 127 N. Y. 34, 14 L. R. A. 211, n. But a cause may be dismissed before a final judgment and another be pursued. Johnson Co., 126 Mo. 344, 47 Am. St. 675, n.

Election of remedies. And. Steph. Pl., pp. 52-60, 2 Van Fleet, For. Adj. 430-443; 1 Herm. Estop. 288, Bigl. Estop. 673-694 (5th ed.); Mills, 126 N. Y. 89, 13 L. R. A. 472, n.; Barndt, 78 Wis. 1, 11 L. R. A. 199, n., 102 Am. St. 223-247. *Concurrent remedies.* Robinson v. Hurley; 1 Beach, Eq. 444, 449. See COURTS. *Another action pending.* 1 Encyc. Pl. & Pr. 750-776; McKyring: 33.

Election of remedies is a doctrine that has its roots in the conserving principles of procedure. From one viewpoint it enforces *Ignorantia excusat;* from another, *Interest reipublicæ ut sit finis litium*—principles of *res adjudicata;* from another, constructive notice. One cannot begin one kind of action and change it to another by amendment. See ELECTION.

The integrity of the doctrine depends on accurate, definite and certain pleadings—pleadings that define one certain thing, and kind of a thing. *Expressio unius.* There shall be no variance or departure. Bristow; Phillips, Pl. 273; Maxw. Pl. 559; 1 Chit. Pl. 644; Bliss, Pl. 396. C. v. Roby; R. v. Waters: 70-74.

Smith is an important case in contract, agency, torts (1 Kinkead, Torts, 4, 5); estoppel, procedure, amendments. See ELECTION. Bish. Conts. 777-808; 2 Herm. Estop. 1028-1058; Bigl. Estop.; *Allegans contraria,* etc.; to stand by demurrer, Bissell: 42. *Equitable election. Streatfield.*

157. INSURANCE CO. v. FOLSOM (1873), 18 Wall. 237 (21 L. ed. 827). *Cited,* §§ 12, 78, 79, Hughes' Proc.; § 119, Gr. & Rud.

"Courts of appellate jurisdiction only" are bound strictly by the record presented to them—by the record. Insurance Co. (pp. 249-259); Houston; Horan; Hall, 8 Colo. 103; Harney: 32.

Nothing, therefore, is open to re-examination in this case except such of the rulings of the court made in the progress of the trial as are duly presented by the bill of exceptions (statutory record), p. 249, citing Tancred, 12 Mees. & W. 316; Campbell v. Porter; Garland; Windsor.

Waivable error must be made to appear by the statutory record, and be duly excepted to. Grand Trunk R. R. But error appearing from the mandatory record needs no exception. Garland: 60; Windsor; Hubbard, 115 Mich. 406, 69 Am. St. 580, n.: cases.

Leading Cases.—157. Ins. Co.

One claiming a right or error must make it affirmatively appear. Horan: 85, 99; Williamson v. Berry: 65; *Actore.* See APPELLATE PROCEDURE.

The right to a review in the supreme court of the United States from a state court depends on an exception. Winona Case; Howard v. Fleming.

158. HARRIS v. S. (1900), 155 Ind. 15.

A motion in arrest of judgment must appear from the mandatory record. It will not be noticed if it appears in the statutory record.

Cited, § 30, Hughes' Proc. Cited, § 237, Gr. & Rud.

Every presumption is against a pleader. This rule was applied to one moving in arrest of judgment, his motion not properly appearing. It was presumed it stated no ground for arresting the judgment. *Verba fortius,* etc.

Bills of exceptions are strictly judged. Hake.

What should appear in the record proper will not be noticed if it appear in the bill of exceptions nor *e converso.* Planing.

159. LANGE v. BENEDICT (1878), 73 N. Y. 12, 29, Am. Rep. 80-97, n., Mech. Pub. Off., Throop, Pub. Off., Cool. Torts, Brown, Jurisdic. §§ 88, 241, 296, Gr. & Rud.

Judicial officers, their liability. See LITERATURE: Hughes' Conts.; Crepps; Piper: 113-114; 2 Bailey, Jurisdic. 896-910; Taylor: 219*a;* Cool. Const. Lim. 432, 6th ed.; Hazeldine v. Grove (1842), 3 Q. B. 997, 3 G. & D. 210 (43 E. C. L. R.), 15 Rul. Cas. 215, n., 11 Mews' E. C. L. 11; *Busteed v. Parsons* (1875), 54 Ala. 393, 25 Am. Rep. 688, n.; Robertson, 99 Wis. 652, 67 Am. St. 889, n. (judges rarely liable); Bailey, Jurisdic. 905. Void proceedings afford no protection for. Truesdell, 33 O. St. 186, Bailey, Jurisdic. 1086; Vaughn v. Congdon (1883), 56 Vt. 111 (void warrants; void records; arresting for outlawed offense). See JURISDICTION. Gardner v. Lynch, 137 Mich. 358, 109 Am. St. 624, n. (justice not liable for void proceedings). Pooler, 75 Me. 488 (warrant void on its face), Wasson, 6 Blackf. 406; Bro. Max. 188, Throop, Pub. Off. 720-736; Tillman v. Beard (1899), 121 Mich. 475, 46 L. R. A. 215, n. (liable for illegal arrest and detention); Londegan, 30 Ia. 508 (void proceedings a defense); Ferguson v. Kinnoull (Auchterarder case) (1843), 9 Clark & F. 251, 311, 8 Eng. Reprint, 412 (liable for ministerial acts); Bro. Max. 90; Stewart v. Case (1893), 53 Minn. 62, 39 Am. St. 575, n., Throop, Pub. Off. 709, 724, Kinkead, Torts.

Liability of judicial officers for usurpation and abuse of power is one of the most unsettled questions of the law. However, upon principle they are liable for conspiracy and corrupt acts, like all other officers. Stewart v. Cooley (1877), 23 Minn. 347, 23 Am. Rep. 690, Cool. Torts, 412, Mech. Ag. 584; Mitchell v. Galen (1901), 1 Alas. 339; Webb, 109 Tenn.

Leading Cases.—159. Lange.

701, 97 Am. St. 863 (superior judges not liable for malicious and corrupt acts).

It has truthfully been said of judicial officers, that they can break down the division of state power, abolish the safeguards of protection, convert the highest guarantees into a mockery, frustrate the ends of government, and against their flagitious wrongs there is no available or adequate civil remedy. John Marshall proclaimed loudly against the insidious attacks of an ignorant, a corrupt and a dependent judiciary. Plainly, "they must not do wrong, unless they choose to," most nearly expresses the law. They deny that legislatures can impair the obligation of contracts, but declare for themselves that power. Hanford: 86; Dash: 237*a*. See Breeze; *Cujus est instituere,* etc.

No jurisdiction no judge. Fabula; Factum; Piper: 114.

It has long been said that judges may be Vicegerents of the Prince of Eternal Peace, or they may be ministers of hell. Governments go up or down with Jurisprudence, which may be destroyed by judges. A good government cannot come from a bad judiciary. All history shows that a government that gives bad judges shares the fate of him who "offends little ones." High judges are all powerful and they make laws of immunity for themselves. And they have made a law that those who offend them or their class will be prosecuted through the forms of the law, and viciously and maliciously. Examples of this may be found in the history and the personnel of the judges in our largest cities. The Tweed Ring of New York required dependent and obsequious judges. In some of the cities judges have no following among lawyers as lawyers; in many cases they are notoriously ignorant of law, and are only wise in political trimming, and securing the appointment which was made to please the congressional leaders of the party in their state, or to win the support of some journal or favorite, or other political instrumentality. The ignorant judge is a curse broad and deep enough, but the affliction is more inflammatory when judges are donees of private gifts, like cars from corporations, and of automobiles that are *custodia legis* in the hands of favorites who have been appointed receivers. The ignorant, political and peculating judge is pointed to in metropolitan centers, where juridical disorders are abundant and are sought and held out to feed the cause of the enemies of law and order.

The opinions of the ignorant judge are destructive of the ends for which opinions are required and published. In too many cases they are written to conceal the real facts of the case. But it is the litigant who knows best that the grounds upon which he counted were neither correctly mentioned nor considered. He is easily convinced that an ignorant and a corrupt judiciary is a contaminating influence in government. The Yorkists and Tudor sovereigns tyrannized upon the assumption that they were above the law. But the Stuarts met the reaction of an abused and aroused people. *Rex non potest peccare* had limitations after the revolution. From the Roman and Norman laws, from the writings of Bracton and the Earl of Pembroke were found much to support the theory that those who set themselves above the law commit crimes in the name of law and order. What has happened in a score of American jurisdictions is clearly reflected from the reports of judicial opinions. See Windsor: 1; S. v. Baughman: 268; Weltmer v. Bishop: 268*a*.

The conflict of national and state courts as to their respective jurisdictions, may be gathered from such cases as M'Culloch v. Maryland; Martin v. Hunter's Lessee, Cohens v. Virginia, Tarble's Case, Buck v. Colbath; Freeman v. Hows, Ableman v. Booth, Neagle's Case, and the conflicts in Missouri and North Carolina as to the validity of state legislation regulating railway fares. Another line of conflict relates to what is a federal question. For the defense of judges this is broad and includes anything the federal court declares. For the protection of title to property (205 U. S. 170), of condemnation for contempt (Patterson's Case), or from applications of estoppel, or from sham and mock proceedings, when these are clearly usurpation, having the effect to establish obligations that must operate in condemnation and confiscation, the private citizen is told that due process of law does not extend to his complaints; or that he has a right, but that it is without remedy. Pettibone.

The condition from the cases justifies the observation that American jurisprudence is lost in a vast marsh formed by the silt of case law not founded on sound principles. Wherever the philosophy of the law is lost, there the law is lost. See Observations under the title EQUITY. What is called "American law" has grown beyond human capacity; its literature is a vast and universally foreboding mass, and such as was viewed by Justinian. Also one thousand years later by Bacon as he looked over the wreck of the Year Book system. The judges of the highest court cannot agree as to what due process of law is, as their opinions show.

The state courts no longer have respect for each other, nor are they respected by many of the federal courts; these permit the state courts to act on such cases as is deemed expedient from case to case. See Genessee Chief (1851). The encroachments of the federal judiciary are constant and are rapidly wearing away state lines, which sooner or later must be abandoned agreeably to the maxims: *In præsentia majoris, cessat potentia minoris* and *Cujus est instituere ejus est abrogare.*

Leading Cases.—159. Lange.

Stability of law can only come from a properly selected federal judiciary. In its selection the Bar Association, or the judgment of lawyers, must pass on those from whom selections are made. Lawyers, not special and political interests, should nominate eligibles from which appointees are named.

It was Saint Paul who placed most confidence in King Agrippa because he had been among the apostles' accusers so long and knew their manners and customs so well.

Procedure partakes of government; if government is constantly changing then so is procedure; if so, then all branches of the law dependent thereon are unsettled.

There are those who believe that Constitutions and Acts of Congress can make a citizenship out of the peoples of Africa and of Asia equal to the Caucasian of Europe; that femininity can likewise be made equal for all purposes to masculinity; that classes from luxury and refined amusements without any stability or fixedness of purpose can govern a great empire and its remote and turbulent provinces; that the owner of a mind trained only for war would nevertheless make a good doctor, or *e converso;* that the political favorite and trimmer ignorant of legal fundamentals or the *datum posts* of the law can nevertheless make a good judge.

The drift of American jurisprudence is indicated in Windsor: 1, and following cases. The attempt to write, to teach and to administer it without regard to the fundamental principles, its *datum posts,* must soon demand attention from constructive statesmen.

160. HASTINGS v. LUSK (1839), 22 Wend. 410, 34 Am. Dec. 330-340, n.; Bigl. L. C. Torts, 121, ext. n. (attorney liable for malice).

Privilege of counsel in argument; liability for defamation. Hastings. Have absolute immunity in England. *Munster v. Lamb* (1884), 11 Q. B. Div. 588, 7 Rul. Cas. 714-731, 23 Am. Law Reg. (N. S.) 12-25, n.; Burdick, Torts, 233, Ames, 430; Tiede. Pol. Power; Harrison.

Scandal and impertinence in pleading. Rosen: 92. Remedy for. Sto. Pl. 266-270, 867.

Is not actionable. Gore v. Condon (1898), 87 Md. 368, 67 Am. St. 352, n., 40 L. R. A. 382. See Randall v. Hamilton (1893), 45 La. Ann. 1184, 22 L. R. A. 649, n.; Sherwood v. Powell (1895), 61 Minn. 479, 52 Am. St. 614, n.; Rice v. Coolidge (1876), 121 Mass. 393, 23 Am. Rep. 279; Whitney v. Allen (1871), 62 Ill. 472. See MALICIOUS ACTS.

Privilege of witnesses. Allen v. Crofoot (1829), 2 Wend. 515, 20 Am. Dec. 647; cited, Cool. Torts, 1 Kinkead, Torts. See DEFAMATION.

Attorney acting *bona fide* under orders of court not liable for contempt. 190 U. S. 1.

Leading Cases.—

161. BROWN v. SWINEFORD (1876), 44 Wis. 282, 26 Am. Rep. 580, 7 Cent. L. J. 268, 158 N. Y. 546, 46 L. R. A. 650, 21 Colo. 338; 11 Am. Cr. Rep. 115; West Chicago R. R., 165 Ill. 302: cases; North Chicago R. R., 165 Ill. 494; Parker, 20 R. I. 378, 78 Am. St. 878, n. (defamatory opening statement); S. v. Irwin (1903), 9 Idaho 35, 60 L. R. A. 716; P. v. Fielding (1899), 158 N. Y. 542, 70 Am. St. 495, 46 L. R. A. 641-672, ext. n., 11 Am. Cr. Rep. 88-124; White, 87 Miss. 564, 112 Am. St. 460.

Argument; irrelevant and abusive argument should be restrained. Brown; Martin v. S. (1886), 3 Miss. 505, 56 Am. Rep. 812-824, n.; Hall v. U. S. (1893), 150 U. S. 76 (37 L. ed. 1008, n.); Graves v. U. S., *id.* 118, 1021: cases; 1 Bish. Cr. Proc. 311, 9 Crim. Law. Mag. 741-774, Cool. Const. Lim. 408-411; P. v. Fielding; Ranchau, 71 Vt. 142, 76 Am. St. 761, n.; Haupt, 108 Ga. 53, 76 Am. St. 19, n.; McDonald, 126 Ill. 130, 9 Am. St. 559-570, ext. n.; Blackman, 108 La. 121, 92 Am. St. 377, n.: cases; 12 Am. Crim. Rep. 170, 583, 256 (court should restrain).

Prompt exceptions to, necessary. West Chicago, etc. R. R. (extremely strict rule held to apply). See 46 L. R. A. 644; Gutzman, 114 Wis. 589, 58 L. R. A. 744; S. v. Tyson (1903), 133 N. C. 692 (objection—exception must be prompt before verdict. Dissenting opinions).

Objection, ruling and an exception, must all be noted. 165 Ill. 302, 304 (complainant held responsible if court fails or refuses to rule). *Lex non cogit ad impossibilia* does not apply here. *One has the right to object.* West Chicago R. R., *supra;* 2 Encyc. Pl. & Pr. 750, 1st ed.

Ruling of court essential. Murray, 167 Ill. 368, 374; North Chicago v. Southwick (objection, ruling and exception must appear); Warder v. Leary (1891), 137 Ill. 319; Elgin R. R. v. Fletcher (1889), 128 Ill. 619 (attention of the judge must be aroused and even demanded). Arbitrary conduct of a judge can defeat a review under these two strict decisions. On principle, the review should be favored, and for reasons found in the rule that judicial action induced upon sham and groundless suggestions is a contempt. Graver: 103.

Mode of objecting to the style of argument of counsel. C. v. Goldstein (1902), 180 Mass. 374, 91 Am. St. 311. *Exception to improper argument is sufficient.*

Need not ask for instruction to court to disregard it. W. U. Tel. Co., 95 Tex. 645. 648: cases. See C. v. Worcester (1886), 141 Mass. 58; Lunsford v. Dietrich (1890), 93 Ala. 565, 30 Am. St. 86 (instruction should have been asked).

Failure to testify; comments relating to is a gross impropriety. Dunn, 118 Wis. 82; Wilson: 154; Hall v. U. S. (1893), 150 U. S. 76.

162. BRUGGER v. STATE INVESTMENT CO. (1878), 5 Sawyer (U. S.) 304; 4 Fed. Cas. 473; Post. Fed. Prac. 11, 74 (multifariousness).

Cited, § 138, Hughes' Proc.; § 40, Gr. & Rud.

Leading Cases.—162. Brugger.

Joinder of causes under codes. A contract may be reformed and a remedy afforded upon it in the same action. Brugger; Miller, 83 Ala. 274, 3 Am. St. 722; 1 Pom. Eq. 353-357; Butler, 60 Conn. 170, 12 L. R. A. 273 n.; Barnes, 75 Ia. 11, 9 Am. St. 450, n.; 1 Encyc. Pl. & Pr. 183; 65 Am. St. 484-485: cases; Bliss. Pl. 116; Beronio, 129 Cal. 232, 61 Pa. 958, 79 Am. St. 118; Christian, 6 Idaho 87, 53 Pa. 211, 96 Am. St. 256 n. (mortgage reformed and foreclosed); Cryps.

Equity attaching for one purpose attaches for all. Middleton Bk., 3 Conn. 135, 6 Am. Dec. 164-168, n.; Ferguson: 264; Hazen, 65 Kans. 38, 93 Am. St. 276, n.; Dickinson: 77 Ark. 570, 113 Am. St. 170; 201 U. S. 245.

Owners of property may appear in federal courts and claim it without regard to citizenship. Freeman: 287; Buck, § 53; convenience. See INTERVENTION.

A transaction, a breach of contract and also a tort causing damage may be joined in one count. Maisenbacker (1899), 71 Conn. 369, 71 Am. St. 213, n.; King v. C. M. R. R.; Emerson v. Nash; *King v. Baldwin,* 17, 8 Am. Dec. 415-428; Smithson v. Smithson (1893), 37 Neb. 533, 40 Am. St. 504, n.; Bliss, Pl. 11, 96, 97; 1 Pom. Eq. 114, 179, 181, 182, 223-242, n., 275.

Creditor may sue debtor and his several, distinct, fraudulent grantees. Fellows v. Fellows (1825), 4 Cow. (N. Y.) 682, 15 Am. Dec. 412; McGowan v. Remington (1849), 12 Pa. 56, 51 Am. Dec. 584-590, ext. n.

Ex contractu and *ex delicto* counts may be joined, when. Woodbury v. Deloss (1873), 65 Bost. (N. Y.) 501, 12 Mor. Min. Rep. 114; 1 Encyc. Pl. & Pr. 110-210; Louisville, etc. R. R. v. Gaines (1896), 99 Ky. 411, 59 Am. St. 465, n.; Garland v. Davis. See RECOUPMENT.

Criminal procedure; joinder of counts; cannot join, distinct felonies, but may misdemeanors. Ben v. S. (1853), 22 Ala. 9, 58 Am. Dec. 234-250, ext. n.; C. v. Shutte (1889), 130 Pa. 272, 17 Am. St. 773, n.; S. v. Fitzsimmons (1893), 18 R. I. 236, 49 Am. St. 766; 1 Bish. Cr. Proc. 421-431, 443-453: cases, 1 Encyc. Pl. & Pr. 163-180; P. v. Sullivan (1903), 173 N. Y. 122, 93 Am. St. 582, n.

The same crime may be charged in different forms and words in different counts. LaSalles v. S. (1892), 90 Ga. 347, 35 Am. St. 216, n.; 93 Am. St. 582, n. *Contra* in civil cases. Sturges: 111. Joinder of actions. 1 Chit. Pl. 221-229.

163. STETSON v. KEMPTON (1816), 13 Mass. 272, 7 Am. Dec. 145; stated, Tyler v. Pomeroy, 1 Wat. Tres. 504, 6 Rob. Prac. 727, Throop, Pub. Off. 740; cited, 1 Wat. Tres. 504, 505, 511, Shear. Neg. 137, Burr. Tax. 13, 301, 370, Blackw. Tax. Tit. *q.v.* Cool. Tax. *q.v.*, 2 Desty, Tax. 644, 1123, 1105, Dill. Corp., Beach, *q.v.*

Cited, §§ 27, 186, 239, Hughes' Proc.

Stetson stated: Officers; when liable in trespass. In 1814, British forces were ravaging the coast of Massachusetts, and Fairhaven was subject to attack. At a town meeting $1,200 was voted, "for the payment of additional wages allowed the drafted and enlisted militia of said town and other expenses of defense." S. was not present at the meeting. His chaise and harness were levied upon and sold to pay his share of the tax. He sued the collector in trespass, and recovered.

Under a statute, "Providing for the poor, for schools, for the support of public worship and other necessary charges," a town cannot render itself liable to do what is expressly the duty of the national government; it must raise, equip and maintain militia, and defend the land from invasion. "Necessary charges" in the above statute is no authority for a town to do what is imposed on other governments and functions of government. Tyler v. Pomeroy; Stetson; *Expressio unius,* etc. County commissioners cannot lease county property without statutory authority. S. ex rel. Scott v. Hart, 144 Ind. 107, 33 L. R. A. 118-122, ext. n.

Assessors are liable for levying taxes upon void items in the assessment, although there are valid items also. Stetson; Eames, *sub,* Savacool: 164; Six Carpenters'; Libby v. Burnham, 15 Mass. 144; stated, 1 Wat. Tres. 505; Drew; Atwell v. Zeluff (1872), 26 Mich. 118; Cool. Tax. 800, 2d ed.

Setting a wrongful thing in motion and causing injury is actionable. Stetson; Ashby; "Squib Case"; Thomas (Drug); Burr. Tax. 300; Cool. Tax. 790 (2d ed. 213); Wall v. Trumbull, 16 Mich. 228: cases; Drew; Nachtrieb v. Stoner, 1 Colo. 429.

Taxation. Taxation must be authorized by valid legislation. Stetson; Loan Ass'n; 1 Wat. Tres. 504, 505; Burr. Tax. 13; Welty on Assessments, 220-229. And the power is strictly construed. Stetson; Lawrence: 132; Welty, Assess.

Collectors of taxes, their liability. Savacool; 1 Wat. Tres. 504-514; Pennock v. County; Herm. Ex. 418; 2 Desty, Tax. 756-762. See TAXATION.

Ultra vires acts of officers do not bind corporation. Shear. Neg. 137; Hill v. Boston: cases. Tyler.

Assessors are liable for laying an illegal tax and thus causing injury. Stetson; "Squib Case"; Inglee v. Bosworth (1828), 5 Pick. 493, 16 Am. Dec. 419, Cool. Tax. 790, 2d ed.: cases; Dickinson' v. Billings (1855), 4 Gray, 42; Judd v. Thompson (1878), 135 Mass. 553; Nachtrieb; Herm. Ex. 418; Williams v. Brace (1824), 5 Conn. 190 (instructive case). Or for acting maliciously and corruptly. *Sub,* Lange: 159.

Assessments must be made within the time specified. Welty, Assess. 224; Thames Co., 7 Conn. 550 (assessments must be within the time specified); Fletcher: 18; Cool. Tax. 415; Westfall, 49 N. Y. 349; 1 Desty, Tax. 607 (must be within time

Leading Cases.—163. Stetson.

fixed for assessing); Freeman, 15 Pick. 44; P. v. Moore (1877), 1 Idaho, 666-670; Magna Charta; Drew, *supra;* Wall v. Trumbull (1867), 16 Mich. 245. A court or tribunal must act at terms specified. *Sub,* Owen v. Weston; Wirthington, 7 Pick. 106; Gage v. Currier (1826), 4 Pick. 399; Little, 10 Pick. 543.

Towns cannot tax for objects for which the state should tax. Stetson: 163; Loan Ass'n; Cool. Tax. 140-163.

Selectmen are liable for levying an illegal tax. Drew, *supra;* Cool. Tax. 554; Kirkwood v. Miller; Westfall; Van Rensselaer v. Witbeck, 3 Seld. (N. Y.) 577; Thames Mfg. Co.

Part of taxes legal and part illegal. Since the authority is statutory, if any part is illegal, all is. Burrough, Tax. 301; McPike v. Pen (1872), 51 Mo. 63; Kirkwood, 6 Mass. 540; 2 Desty, Tax. 11: cases. (A tax can not be valid in part and void in part.) A trespass cannot be apportioned. Burr. Tax. 301. Six Carpenters'.

Joint trespassers. Kirkwood; Stetson; St. Helen's Smelting Co. v. Tipping.

164. SAVACOOL v. BOUGHTEN (1830), 5 Wend. 170, 21 Am. Dec. 181-209, ext. n., Bigl. L. C. Torts, 241-285, ext. n., Pattee, Cas. Torts, 327; Erwin, Cas. 257; Connor: 104 U. S. 228, 238; Ald. Jud. Writs, § 106, n., 168 Mass. 193, 60 Am. St. 379, 1 Wat. Tres. 465, n., 1 Freem. Ex. 100, 101, 81 Ill. 329, Mech., Throop, Pub. Off., Mech. Ag., Cool. Torts, Bish., 1 Wat. Tres., Herm. Ex. 151-153: cases; 2 Desty, Tax. 761; 1 Kinkead, Torts, 177: cases; S. v. Weed.

Cited, p. 13; §§ 27, 42, 49, 85, 98, 101, Hughes' Proc.; §§ 99, 122, Gr. & Rud.

Officers are bound to obey process. Where a person does an act by command of one exercising judicial authority, the law does not suppose that he acted from any wrongful or improper motive, because it was his bounden duty to obey. *Qui jussu judicis,* etc. Bro. Max. 93. The law will not punish what it commands. *Necessitas quod cogit defendit.*

Regular process will always protect an officer executing it. Savacool; Cool. Tax. 798; Mech. Pub. Off. 689-694; cases; 2 Smith, Lead. Cas. 1042, 9th ed.; Crepps v.-Townsly-Myrick Co., 58 Ark. 181, 41 Am. St. 97, n., Henline v. Reese (1896), 54 Ohio St. 599, 56 Am. St. 736 (officer not bound to execute, but if he does it is an absolute protection if pleaded in defense); Housh v. P. (1874), 75 Ill. 487, 2 Am. Crim. R. 487; Rice, 70 Tex. 613, 8 Am. St. 630, n.

Officer knowing judgment is void is not protected. If the officer knows the court issuing the process has no jurisdiction, then he is not protected; *e. g.,* if a constable learns that he is to arrest or interfere with an ambassador or consul upon process issued by a state court, then he is not protected. Tellefsen v. Fee (1897), 168 Mass. 188, 60 Am. St. 379: cases, 45 L. R. A. 481, n. (jurisdiction and power of consuls); Grace v. Mitchell (officer must

Leading Cases.—164. Savacool.

act bona fide); 1 Kinkead, Torts, 179: cases (when officer has knowledge *dehors* the writ); Bish. Torts, 795; Sprague, 1 Wis. 387; Mitchell, 13 How. 115 (military orders must be legal); Riggs v. S. (1866), 3 Cold. 85, 91 Am. Dec. 272, 3 Crim. Def. 257 (soldiers must obey orders if legal); Leachman: 81 Ill. 324 (officer cannot tamper with his process and then defend under it).

Void judgment is no protection, as where there was no jurisdiction of a defendant. Chetelat, 7 Colo. Ap. 68; Borden.

What is regular process. Void items commingled with valid ones are not. Eames v. Johnson (1862), 4 Allen, 382, Shear. Neg. 171: cases; Leachman, *supra.* Omission of essential name vitiates process. Capps v. Leachman (1897), 90 Tex. 499, 59 Am. St. 830; Douglas v. Whiting (proceedings collaterally attacked); St. Louis Co., 138 Mo. 533, 60 Am. St. 565, n. (is the defense of the officer and not of a third person).

Burden of proof is on officer to show legal process. See J'Anson: 91; Virginia Coupon Cases: 285*a*; Piper: 114. He must allege it. *De non apparentibus,* etc.; an authority must be pleaded. J'Anson; *Res adjudicata;* and he must prove it. *Actore,* etc.: 2 Gr. Ev. 629. One of the purposes of a record is to afford protection to officers acting under it. J'Anson; Rushton: cases; Howard v. S.; Nixon; Six Carpenters': cases. See LITERATURE, Hughes' Conts.

Defective plea aided by waiver. Deitsch.

Judicial power; immunity of, from liability. Lange: 159; *Rex non potest peccare.* Of governmental agencies. Hill v. Boston.

Officers; their liability. 1 Kinkead, Torts, 170-181: cases.

Justification defenses must be pleaded. See JUSTIFICATION; J'Anson: 91.

165. SIX CARPENTERS' CASE (Vaux v. Newman) (1611), 8 Coke, 146, 1 Sm. Lead. Cas. 257-267, 8th ed.; 11th ed. (reviews English cases); Chase, Torts, 155, Ames, Torts, 270, Wat. Tres. 493, 2 *id.* 790-791, Bro. Max. 126, 301, 302, 121 Ind. 233, 6 L. R. A. 736 Cool., Bish., 1 Add. Torts, 476, 730, 2 Gr. Ev., *q.v.* Freem. Ex., Herm. Ex.; Boston, 85 Me. 462, 35 Am. St. 379, n.; Allen v. Crofoot (1830), 5 Wend. 506, Erwin, Torts, 481 (when entry is unlawful).

Cited, p. 33, Hughes' Proc.; § 67, Gr. & Rud.

The law gives the public the right to enter an inn. Calye's Case: Exercising this right and license six carpenters entered an inn and called for drink, which they paid for. Afterward they called for more, for which they refused to pay. *Held;* they were trespassers *ab initio. Acta exteriora.*

Trespassers ab initio. Malcom v. Spoor (1845), 12 Met. 279, 46 Am. Dec. 675, Bigl. Lead Cas. Torts, 328, n.; Ald. Jud. Writs, 179 (entrusting a drunken person with goods levied upon constitutes the officer a trespasser *ab initio*); Barrett v. White (1825), 3 N. H. 210, 14 Am. Dec.

Leading Cases.—165. Six Crp'trs.

352 n. (reviewing Six C. Case. Officer abusing chattel levied upon); Lamb v. Day (1836), 8 Vt. 30 Am. Dec. 479 (abuse of power by an officer). S. P., Cressy v. Parks (1883), 75 Me. 387, 46 Am. Rep. 406; *Dehm v. Hinman* (1888), 56 Conn. 320, 322, 1 L. R. A. 374, Anderson v. Cowles (1899), 72 Conn. 335, 77 Am. St. 310 (failure to return process renders officer liable). S. P., Buller, N. P. 23; 6 Bac. Abr. Trespass, B.

One exercising an authority given by law and abusing it, is a trespasser ab initio; Malcom; Six Carpenters' Case; Barrett; Lamb. Officers executing process are governed by the principle in the Six Carpenters' Case. Dehm: cases. S. P.; Barrett; Anderson: cases; Lamb.

Officers must return process, else they are not protected under it. Tubbs v. Tukey (1849), 3 Cush. 438, 50 Am. Dec. 744; Munroe v. Merrill (1856), 6 Gray 236 (*rationale* of rule stated); Wiggin v. Atkins (1884), 136 Mass. 292 (officer liable in an attachment case). Paine v. Farr (1874), 118 Mass. 74; Wright v. Marvin (1887), 59 Vt. 437; Oystead v. Shed (1815), 12 Mass. 505; Williams v. Ives (1857), 25 Conn. 568 (Six Carpenters' Case; stated and applied in an attachment case); Monarch v. Bird (1879), 63 Ala. 500; Dehm; Anderson. A return of process is essential for a plea of justification. 6 Bac. Abr., Trespass, B., quoted in 77 Am. St. 310.

Process must issue for protection of the officer. Blair: 170. And it must be sufficient. Howard v. S.; Savacool.

Proceedings for failing to make a return. Swenson, 10 So. Dak. 188, 66 Am. St. 712, n. (plaintiff's remedies).

Officers who abuse their powers can make no defense of justification. Crepps: 113. See Lange. The importance of the record for protection also appears from the above. Savacool cases; J'Anson; Tarble: 247; those who have no respect for the law can take no advantage under the law. Armory.

166. HOWARD v. S. (1899), 121 Ala. 21, 25 So. 1000, 11 Am. Crim. Rep. 664.

Cited, §§ 21, 22, 28, 38, 49, 70, Hughes' Proc.

One may resist a void warrant; this, if resting on a conclusion of law, is void, and will not protect an officer executing it. A warrant which as a cause for arrest, recites: "Complaint, on oath, having been made before me that the offense of threatening breach of the peace has been committed," does not state a crime, is not a sufficient peace warrant and is void. Crepps: 113.

An order granting a new trial, based solely on the legal conclusion that a special verdict is inconsistent and evasive, is not an order made in the exercise of the court's discretion. Miller v. Casco (1903), 116 Wis. 510.

A sufficient record necessary to protect officers executing process is one of the conserving principles of procedure. See CONCLUSIONS OF LAW. U. S. v. Cruikshank: 232; J'Anson: 91; Tarble's Case: 247; Six Carpenters: 165.

Leading Cases.—166. Howard.

It is not a crime to resist one who endeavors to make an arrest under a void warrant. See ARREST; Noles v. S.; Housh, 75 Ill. 487, 2 Am. Crim. Rep. 487.

Warrants; process must be sufficient to constitute regular process. Savacool: 164; Housh.

Sufficient allegations requisite to confer jurisdiction to protect officers. Semayne's C.; Fisher, *sub,* Rushton.

167. ALLEN v. WRIGHT (1838), 8 Car. & P. 522 (34 E. C. L. R.), Bigl. L. C. Torts, 265, 285, ext. n., Erwin, Cas 280, 1 Wat. Tres. 315: cases, 4 Mews' E. C. L. 1925, citing Price v. Seely, Fox v. Gaunt, Timothy v. Simpson, R. v. Sherlock, R. v. Cumpton, 9 Mews' E. C. L. 710, citing Brown v. Chapman, West v. Smallwood.

Cited, § 19, Hughes' Proc.; §§ 152, 294-296, Gr. & Rud.

Arrests; law of. Allen: 167; Tiede, Pol. Power, note 61 Am. Dec. 151-164; 1 Bish. Crim. Proc. 155-218; 177 U. S. 538: cases; Bouv. Dic.

Private person may arrest for a felony and take the accused before a judicial officer. Burk, 179 Pa. 539, 57 Am. St. 607.

With and without a warrant. Palmer R. R. 92 Me. 399, 69 Am. St. 513; S. v. Lewis (1893), 50 Ohio St. 179, 9 Am. Cr. Rep. 49-62 ext. n.

What information should be imparted at the time. S. v. Taylor (1893), 70 Vt. 1, 42 L. R. A. 673-684, ext. n., 67 Am. St. 647; Semayne's; Fleetwood v. C. (1882), 80 Ky. 1, 4 Am. Cr. Rep. 36, n. (officer should disclose his identity if possible and show his warrant unless the charge is felony).

Right to resist an unlawful arrest. S. v. Davis, 53 S. C. 150, 69 Am. St. 845; John Bad Elk, 177 U. S. 529; Howard v. S.: 166.

Right to break and enter doors. Semayne's; *Domus sua.*

Privilege from arrest. Dunlap. Members of legislature. Tucker, Const. 206.

Things taken from accused persons; admissibility in evidence. Counselman: 178. Adams v. New York (are competent).

Arrest in civil suits. 1 Fost. Fed. Prac. 22, 370.

Injunction to restrain illegal arrest. Id. 215. Arrest of persons upon a second warrant pending hearing upon return to a writ of *habeas corpus. Id.* 367.

False imprisonment; restraint of persons for the peace, security or health of the community; malicious abuse of process. 1 Kinkead, Torts, 212-235.

168. DUNLAP v. CODY (1871), 31 Iowa 260, 7 Am. Rep. 129-136, n.; Brown, Jurisdic.

Cited, §§ 147, 151, 325, Hughes' Proc.

Acquisition of jurisdiction by fraud, will vitiate. Dunlap; 1 Bailey, Juris. 163. *Executio juris non habet injuriam; Ex dolo malo,* etc.

Process served by fraud will be set aside. Dunlap; Holker, 141 Mo. 527, 64 Am.

Leading Cases.—168. Dunlap.

St. 524, n. See Bro. Max. 439; *Ex dolo malo*, etc.

Parties, attorneys and witnesses attending court are exempt from service of process. Fries; Cole v. Hawkins (1738), And. 275, Stra. 1098, Ald. Jud. Writs, 116; U. S. v. Edme, 9 Ser. & R. 147; stated, Ald. Jud. Writs, 116 *Contra* cases; Hoffman, 113 Mich. 109, 67 Am. St. 458, n.; Murray, 122 Iowa 188, 64 L. R. A. 534: cases.

Witnesses cannot be arrested or served with process while attending court. 1 Gr. Ev. 316. Nor while voluntarily attending. Malloy v. Brewer (1895), 7 S. Dak. 587, 58 Am. St. 856: cases; Ela, 68 N. H. 312; Kaufman v. Kennedy (1885), 25 Fed. Rep. 785.

Members of the legislature and other persons are not privileged. Berlet, 67 Neb. 75, 60 L. R. A. 609, n., 108 Am. St. 616, n., 1 Tucker, Const. 206 (members of congress privileged).

Non-resident parties; when they may be served. Parker, 136 N. Y. 685, 32 Am. St. 770, n.; 20 L. R. A. 45, n.; Sweet, 166 Mass. 332, 55 Am. St. 406, n.; 42 Cent. L. J. 307 (cannot be). *Contra:* Baisley, 113 Mo. 544, 33 Am. St. 726, n.; Holyoke Co., 55 Fed. Rep. 593, 21 L. R. A. 319, n.; Brooks, 4 Fed. Rep. 166. See Ald. Jud. Writs.

Exemption from service of process. Worth, 56 S. C. 56, 76 Am. St. 524-543, ext. n., 64 L. R. A. 534: cases.

A legal act cannot be done by illegal means. Ilsley; *Quando jus*, etc.; Rutland's (Countess of) Case, 6 Rep. 53; stated, Bro. Max.

The due administration of justice is respected and vindicated by courts. See Pettibone.

169. ILSLEY v. NICHOLS (1831), 12 Pick. (Mass.), 270, 275, 22 Am. Dec. 425, n., Ald. Jud. Writs, 175; 11 Rul. Cas. 643; 203 U. S.

Quando aliquid prohibitur, etc. A legal act cannot be done by illegal means. Bro. Max. 488; Webb v. Ins. Co.; Six Carpenters'; Blair: 170. A trespasser cannot set off with the benefits of his trespass. Bull; *Id tantum*, etc.

Property cannot be seized upon the person. *Salus populi*, etc. See ARREST; SEARCH; Green: 90; DURESS; Watkins v. Baird; Sasportas v. Jennings; *Executio juris non habet injuriam.*

If documents are illegally seized and offered in evidence the court will only consider their competency. 1 Gr. Ev. 254*a*; *Nemo tenetur*, etc.; Adams v. N. Y.

If doors are broken to illegally serve process, this will not vitiate the service, but is a ground of liability against the sheriff. Bro. Max. 438. *Contra:* Ilsley; Semayne's.

What cannot be done directly cannot be done indirectly. Ex parte Miller (1900), 124 Ala. 130, 30 So. 611, 87 Am. St. 49 (enjoined person cannot by subterfuge violate it); 192 U. S. 305; Webb; Graham v. Folsom. See Pettibone.

Leading Cases.—

170. BLAIR v. READING (1881), 99 Ill. 600. Galpin v. Page. Cited, § 383, Hughes' Proc.; §§ 61, 99, Gr. & Rud.

Powers of judges in vacation. All tribunals must act at time and place provided for. Fletcher v. Trewalla; Drew v. Davis. See TERMS OF COURT; Filley v. Cody (1878), 4 Colo. 109.

Process must issue to protect an officer. Blair; Savacool. Sale without process is void. Benton.

A lawful act cannot be done in an unlawful way, e. g., carrying concealed weapons will not authorize an unlawful arrest and search. Pickett v. S. (1896), 99 Ga. 12, 59 Am. St. 226, n.; Ilsley.

One of the requirements of due process of law is a court that can convene, hear and determine. Murray: 219.

Courts must act at time and place specified. Blair; Freem. Judg. 121; Bond v. Pachico (1866), 30 Cal. 530; Stetson: 163.

Courts must proceed judicially. Blair: 170; Windsor: 1; Munday: 79.

171. R. v. KEYN (1876), 2 Ex. D. 63, 13 Cox, C. C. 403, Snow, Cas. Int. Law, 551: stated, Gould, Wat. 11; 8 Rul. Cas. 11: cited, 1 Bish. C. L. 104, Gould, Wat. 1-16, 27, 49, 64, 148.

Jurisdiction; admiralty; concurrent jurisdiction with common-law courts; foreigners on foreign ships. C. v. Manchester (1890), 152 Mass. 230, 23 Am. St. 820-841, n. (jurisdiction over tide waters; fisheries).

Admiralty and common-law jurisdiction in maritime cases. Ror. Int. Law, 396-404; Mostyn: 274. Jurisdiction over adjoining seas. 1 Kent, 26-31.

Maritime law, 3 Kent, 1-21.

172. C. v. MACLOON (1869), 101 Mass. 1, 100 Am. Dec. 89-110, n.; Clark, Crim. Cas. 440, 1 Bish. C. L. 115, 8th ed.; 42 Ga. 43, 44 Am. St. 77, Brown, Jurisdic.

Cited, § 294, Gr. & Rud.

Venue; jurisdiction. One who does a criminal act in one county or state may be held liable for its continuous operation in another. This is extendedly discussed in relation to larceny.

C. v. Macloon; R. v. Lewis; C. v. Uprichard; McNeeley, 36 W. Va. 84, 15 L. R. A. 226, n.; S. v. Hall, 114 N. C. 909, 41 Am. St. 822; citing Macloon and U. S. v. Guiteau (penal and criminal laws are local); Simpson v. S., 92 Ga. 41, 44 Am. St. 75-84, ext. n.

Homicide; definition of: cases. Defendant not guilty unless he did all of the acts occasioning death, or aided or abetted. Macloon.

Crimes committed partly in one state and partly in another. Ror. Interstate Law, 310, 320-327; *citing* Macloon; Brown, Juris. 35; Mostyn; R. v. Lewis; Clark, Crim. Cas. 431-452; 1 Bish. C. L. 115-117; U. S. v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247, 3 Crim. Law Mag. 680, 10 Fed. 161, Clark, Crim. Cas. 36: cited, 1 Bish. C. L. 112, 115, Ror. Inter. Law, 321, 1 Crim. Law Mag. 689-716, 2 Crim. Def.

Leading Cases.—172. Macloon.

358; R. v. Brisac (1803), 4 East, 164-172, 7 R. R. 551, 8 Rul. Cas. 138; Bish. Cr. Proc.; Whart. Cr. Pl. & Prac., Clark, Cr. Proc. Hargis (1905), 27 Ky. Law Rep. 441, 69 L. R. A. 270-276: cases (wound in one county and death in another).

Shipboard; high seas; crimes committed on. Jurisdiction Macloon; 1 Bish. C. L. 117; R. v. Lewis; 8 Rul. Cas. 1-15. Homicide, felonious. 1 Bish. C. L. 613-745.

Statutory division of murder into degrees. Whitford v. C. (1828), 6 Rand. (Va.) 721, 18 Am. Dec. 771-787, ext. n.

Crimes; jurisdiction of crimes as between the U. S. and foreign nations. 1 Bish. C. L. 99-144; 1 Bish. Cr. Proc.; Whart. Cr. Pl. & Pr.; Clark Cr. Proc. Jurisdiction of the U. S. within state limits. 1 Bish. C. L. 156-181; Tarble's Case. National jurisdiction outside the states. 1 Bish. C. L. 182-188. *Locality of crimes committed through the mails.* S. v. Hudson (1893), 13 Mont. 112, 19 L. R. A. 775, n.

Venue in crime. 8 Rul. Cas. 138-149, n. *Crimen trahit personam.*

Jurisdiction has many elements to be considered. A leading one is place of the wrong or deliction of subject-matter. See JURISDICTION; Munday; Mostyn: 274; territorial jurisdiction. Milligan's; Mostyn (location of land); Windsor: 1.

173. R. v. LEWIS (1857), Dearsly & Bell C. C. (Eng.), 182, 2 L. C. C. (B. & H.) 298-303, n., 7 Cox, C. C. 277; Clark, C. C. 451, 8 Rul. Cas. 4, 1 Bish. C. L. 112, 121.

Cited, § 169, Gr. & Rud.

Lewis stated; Manslaughter; death from injuries inflicted on high seas; foreigners; jurisdiction; venue. Lewis was a Frenchman by birth, but a naturalized citizen of the United States, and not of England. The deceased, George, was a German, not a subject of England. Both were sailors and were serving as such on the Guy Mannering, an American vessel commanded by an American master, and sailed from New York for Liverpool under the United States flag. During this voyage G. was subjected to much cruelty from L. and others. Four days before arriving at Liverpool, while yet upon the high seas west of Cape Clear, in Ireland, the last act of cruelty was inflicted by L. upon G., from which he died in the hospital upon the afternoon of the day they arrived at Liverpool. L. was convicted of manslaughter. *Held,* that the offense was not cognizable by the law of England, and that the conviction was wrong. R. v. Lewis; C. v. Macloon; Mostyn: 274; R. v. Anderson (1868), L. R. 1 C. C. R. 161, 11 Cox. C C. 198, 8 Rul. Cas. 1-15, n.

Mortal wounds given by one foreigner to another upon a foreign ship, upon the high seas, are not cognizable in England. Lewis, *venue in crime.* 1 Bish. Crim. Proc. 45-67; *sub,* Mostyn: 274.

Leading Cases.—

174. S. v. CONWELL (1902), 96 Me. 172, 51 Atl. 873, 90 Am. St. 332, n.

Cited, p. 35; §§ 37, 42, Hughes' Proc.

Search warrants—issue on Sunday. The fact that a search and seizure warrant is issued on Sunday does not render it invalid.

Judicial and ministerial acts; distinctions. Act of magistrate in issuing search warrant is ministerial and not judicial.

Dies Dominicus, etc., has no reference to ministerial acts, but only to judicial acts. By the common law, Sunday is *Dies non juridicus* and all judicial proceedings upon that day are void, but ministerial acts could always be performed upon that day. Heisen, 138 Cal. 216, 94 Am. St. 39; Pearce, 13 Mass. 324 (arrests allowed on Sunday for felony and breach of the peace); Johnson, 34 Mass. (17 Pick.) 106 (limitations of *Dies Dominicus,* etc.); S. v. Conwell; Mackally's Case (1613), 9 Coke, 65 cited, 15 Rul. Cas. (the law of arrest); Van Vetchen: 12 Johns. 178 (issuing process is a judicial act). See *Dies Dominicus,* etc.; Hauswirth: 51; SUNDAY.

Expressio unius, etc. Statute forbidding service of process in civil cases does not apply to criminal cases. S. v. Conwell.

Sunday laws are strictly construed. Crepps: 113. Without a statute there is no Sunday, except *Dies non,* etc. See SUNDAY; Hughes' Proc.

Service of process on Sunday is absolutely void, and is not waived by a general appearance and asking to plead. Taylor, 3 East. 155, 6 R. R. 575, 13 Mews' E. C. L. 1970.

174a. LANGABIER v. FAIRBURY, etc., R. R. (1872), 64 Ill. 343, 13 Am. Law. Reg. (N. S.), 747, n., 16 Am. Rep. 550.

Cited, §§ 28, 51, Gr. & Rud.

Process may be served on Sunday, if necessitous. Hauswirth; Conwell; *Dies non.*

175. WHITE v. FORT (1824), 3 Hawks (N. C.), 251, 1 Lead. Crim. Cas. (B. & H.), 34, n.

Cited, §§ 120, 136, 222, 324, 325, Hughes' Proc.; cited, §§ 294, 296, Gr. & Rud.

Merger of the civil into the public wrong. White, 1 Bish. C. L. 271, 267, 970; 1 Chit. Pl. 130 (145, 16th Am. ed.); Whitford v. S. (1887), 24 Tex. Ap. 489, 5 Am. St. 896-901, n; Hamilton v. Whitridge. A bigamist is liable in an action for seduction. Borden: 267.

Merger in civil cases. Upon this, a widely cited case is Forbes v. Moffatt (1811), 18 Vesey, Jr. 384, 34 Eng. R. 362, 17 Rul. Cas. 364-392: cited, 2 Wash. R. P. 195, 517; 2 Kent. 2 Pom. Eq. 768-800; 1 Beach, Eq. 450; 2 Sto. Eq. 1036, n.; Fowler v. Fay, 62 Ill. 375; Jones, Mort. 848-873; James v. Morey (1823), 2 Cow. 246, 14 Am. Dec. 475-514, n., 3 Dev. Deeds, 1318-1346.

Merger from Res adjudicata. C. v. Roby; R. v. Westbeer; Bendernagle, *sub, Res adjudicata.*

Leading Cases.—

176. DIMES v. PROPRIETORS OF THE GRAND JUNCTION CANAL (1852), 3 H. Ld. Cas. 759, 16 Eng. Law & Eq. 63, Zinn, L. C. Trusts, 458, 12 Beavan, 63, 2 Mac. & G. 285, 2 Hall & T. 92. *Newcombe v. Light*, 58 Tex. 141, 44 Am. Rep. 604 (former attorney for a party cannot sit as judge).

Cited, pp. 33; § 5, 5*b*, 51, 52, 147, 150, 159, 160, 162, 165, 166, 167, 178, 203, Hughes' Proc.

Cited, §§ 46, 63, 70, 119, 134, 137, 263, Gr. & Rud.

Nemo debet esse judex, etc.: No man can be judge of his own dispute. Meyer, 121 Cal. 102, 65 Am. St. 22: cases, 41 L. R. A. 762; S. v. Board, 19 Wash. 8, 67 Am. St. 706-722, 43 L. R. A. 317 (prohibition to protect); Oakley: 222; Cool. Torts, 492-496; Const. Lim. 506-509, 6th ed.; S. v. Call (1899), 41 Fla. 442, 26 So. 1014, 79 Am. St. 189, n. (liberal rule); S. v. Wall (1899), 41 Fla. 463, 79 Am. St. 195-205, ext. n., Brown, Jurisdic. Crook, 124 Ala. 479, 82 Am. St. 190 (judge should refuse to sit, even if parties consent); Hilton, 64 S. C. 201, 92 Am. St. 800, n. (parties may consent); Perez, 41 Fla. 463, 49 L. R. A. 548, n. (disqualification of judge for relationship to party); Robert, 115 Ga. 259, 90 Am. St. 108 (degree of relationship considered).

177. VAN SLYKE v. TRENPEALEAU COUNTY INS. CO. (1876), 39 Wis. 390, 20 Am. Rep. 50, And. Dic. 335, Suth. Stat. 395.

Cited, § 101, Hughes' Proc.

Judicial power cannot be delegated. Those invested with judicial power must exercise it throughout a trial. Ellerbee, 75 Miss. 522, 41 L. R. A. 569, n. (absence of, vitiates a conviction); P. v. Tupper, 122 Cal. 424, 68 Am. St. 44 (absence of judge vitiates). *Judice judex delegatus*, etc.

Presence of judge required throughout, 32 Colo. 127.

Official functions not a subject of contract. See *Ultra vires*; P. v. Hastings: 144. See also cases, *sub*, Dimes Case.

Executive functions can be delegated. A constable, however, can appoint a deputy. Taylor (Cal.). But judicial functions can not be delegated. Runkle: 120.

Failure of judge to take an oath may be waived. First Nat'l Bk., 28 Wash. 239, 92 Am. St. 828.

Division of state power. Dennett: 145, 146 (clerks can not act for judges).

178. COUNSELMAN v. HITCHCOCK (1802), 142 U. S. 547 (35 L. ed. 1110), 12 Sup. Ct. Rep. 195, Thayer, Cas. Ev. 1130, 3 Inter-State Com. Rep. 816, McClain, Const. Law, 990; 161 U. S. 660; Evans, 174 Mass. 287, 75 Am. St. 316-347, ext. n., Tucker, Const. 332 (first ten amendments); Fost. Fed. Prac. 275, 366 (*Habeas Corpus*); 117 Wis. 388.

Cited, §§ 349, 350-352, Hughes' Proc.

Cited, §§ 262, 269, 271, 272, 292, 294, Gr. & Rud.

Nemo tenetur seipsum accusare: No man can be compelled to criminate himself.

Leading Cases.—178. Counselman.

Counselman. Inter-State v. Brimson; Cohen, 104 Cal. 43 Am. St. 127, 26 L. R. A. 423, *citing* Counselman; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22-30; Cullen v. O., 24 Grat. (Va.) 624; *Nemo tenetur*, etc.; U. S. v. James, 60 Fed. Rep. 257, 26 L. R. A. 418-423 (Cohen Case denied); Gould, 99 Cal. 362.

Privilege of witness from self-crimination. Fries, *sub*, *Nemo tenetur*, etc., 75 Am. St. 331; Clark, Crim. Proc. 223. Hale v. Henkle.

Ballman, 200 U. S. 186 (not bound to produce books) Jack v. Kansas, S. C. 69 Kan. 387, 1 L. R. A. N. S. 167-176 ext. n.

Admissibility in evidence of things taken from accused persons. S. v. Edward, 51 W. Va. 220, 59 L. R. A. 465-477, ext. n. See ARREST; Allen: 167. *Nemo tenetur*, etc.; Adams v. New York (are admissible); 117 Wis. 338.

179. CAROTTI v. S. (1868), 42 Miss. 344, 97 Am. Dec. 465-472, n.

Continuity; doctrine of. When a condition or state of being is once shown to exist, this is presumed to continue until the contrary is shown. 1 Gr. Ev. 41, 42, 4 Wigm. Ev. 2530. Bell v. T.; McNaghten; Friend v. Ward.

In constructive notice this is an important rule. Ransom: 122; Ricketson, 59 (service by publication); Welty, Assess. 223; 1 Cool. Tax. 481-487.

180. ARMORY v. DELAMIRE (or DELAMIRIE) (1742), 1 Strange (Eng.), 504, 1 Smith L. C. 679-713, 11th ed. (reviews English cases); Bigl. L. C. Torts, 88, 89, 1 Gray, Cas. Prop. 368, Beale L. C. 10 Mor. Min. Rep. 66; Chase, Cas. Torts, 201; 1 Gr. Ev. 34, 37, 2 Best, 11-13, Ell. 94, 117, 227; Wells, Cobbey, Replev.; Suth. Dam.; Sedgk. Dam.; 2 Kent; Cool., Bish., Add., Torts; Bigl. L. C. Torts; 2 Chit. Conts. 1333; 2 Whart. Ev. 1264, 1266; Rule 25, Moak, Underh. Torts, *id.* 590; 18 Am. Dec. 55-58; Godd. Easements, 443 (Benn. ed.); Jones. Ev. 16, 17; Mews' E. C. L. 597; Lupton, 15 Vesey, 432, 33 Eng. Reprint, 817, 10 R. R. 94; Suth. Dam. (cites and approves Armory); *Orser*, 9 Cow. 687, 18 Am. Dec. 543-560, ext. n.; Woodman, 49 N. H. 387, 6 Am. Rep. 526 (possession is sufficient against a wrongdoer); Hay v. Peterson (1896), 6 Wyo. 419, 34 L. R. A. 581-593.

Cited, p. 42; §§ 27, 129, 154, 155, 315, 315*a*, 326, 327, 330, Hughes' Proc. See *Omnia præsumuntur contra.*

Armory stated: Omnia præsumuntur contra spoliatorem. A chimney sweep found a diamond ring, and, to learn its value, delivered it to a jeweler, who removed the stone and then returned the ring and offered a trifle for the stone, which was refused, and suit was brought for its value, but its production was withheld, and of course wrongfully. Accordingly, the jury was instructed to return the value of a diamond of the first water that would fit the socket. *Res ipsa loquitur.* Here is a useful evidence phase, including the rule that possession is sufficient against a wrongdoer, a leading rule in ejectment,

Leading Cases.—180. Armory.

trover and replevin, and it is often considered in trespass and larceny. The case is very useful in procedure. In many relations it is applicable. At all events, possession is a right which constitutes a subject of sale of conveyance.

Presumptions from spoliation, fabrication or suppression of evidence. Jones, Ev. 16, 19, 289, 578, 579.

In all relations its leading idea, namely, he who does not obey the law can claim no protection from the law, applies. *Frustra legis auxilium quærit qui in legem committit.*

Value of goods. When a person has wrongfully converted property it will be assumed as against him, if he will not produce it, to have been of the best description. "Every presumption is against a wrongdoer." Armory. The thing speaks for itself. Kearney: 211.

One should produce the best evidence possible. The best evidence is required. Blatch, Cowp. 3; Runkle, 153 U. S. 216; Dimond v. Henderson, 47 Wis. 172; Iverslie: 46; C. v. Kane: 184.

Possession is sufficient against a wrongdoer, is an important rule in ejectment, replevin, conversion and trover. This rule should be well understood. 1 Smith, L. C. 358, 11th ed.; Rice v. Travis.

181. LANFEAR v. MESTIER (1866), 18 La. Ann. 497, 89 Am. Dec. 658-697, ext. n.; cited, 179 U. S. 367.

Cited, §§ 6, 69, 78, 92, Hughes' Proc.

Cited, §§ 11, 19, 272, 281, 309, Gr. & Rud.

Judicial notice; takes the place of proof. S. v. Main (1897), 69 Conn. 123, 61 Am. St. 30; Brown v. Piper (1875), 91 U. S. 37, 42; Thayer, Cas. Ev. 91; Grimes v. Eddy (1804), 126 Mo. 168, 47 Am. St. 653-668. That the World's Fair was at Chicago. McCoy v. World's Colum. Ex. (1900), 186 Ill. 356, 78 Am. St. 288. Labatt, Mas. & Ser. 834. That oleomargarine is an article of commerce. Shellenberger v. Pa. (1897), 71 U. S. 1. Austin v. S. (that cigarettes are wholly bad, and bad only). See CONCLUSIONS.

182. OLIVE v. S. (1889), 8 Ala. 88, 5 S. Rep. 653, 4 L. R. A. 33-44, ext. n.; 1 Gr. Ev. 4-6; Suth. Stat. Construc. 293-305: cases; Sto. Wade Pl. 24, Notice, 1403-1417.

Cited, §§ 6, 78, Hughes' Proc.; §§ 272, 309, Gr. & Rud.

Judicial notice. Suth. Stat. 293-305. See Lanfear; also, JUDICIAL NOTICE; *Probatis extremis præsumuntur media; Res ipsa loquitur.* Pleading matter of judicial notice is forbidden. Bliss, Pl. 177-179. Matters of law need not be pleaded. Green: 90.

183. C. v. KANE (1871), 108 Mass. 423. 11 Am. Rep. 373-375. Cited, §§ 53, 272, Gr. & Rud. Rules of evidence are often affected by convenience and necessity. Requirements for expedition and economy establish many rules. See § 53, Gr. & Rud.

Cited, §§ 110, 199, Hughes' Proc.

A primary rule of evidence is, that, the best evidence of which a case in its nature is susceptible must be produced. Iverslie: 46. 1 Gr. Ev. 82-97; 1 Whart. Ev. 60-76; Whart. Crim. Ev. 152-218; 1 Bish. Crim. Proc. 1080-1087; Queen's Case; 53*a*. A part of this rule is: What ought to be of record, must be proved by record and by the right record; § 104 Gr. & Rud. Planing Mill Co. See ORAL EVIDENCE.

Leading Cases.—183. C. v. Kane.

A general method of proof is sometimes permissible where great prolixity is thereby avoided. C. v. Kane; King: 205; Farnam: 97. The presumptions of regularity (*Omnia præsumuntur rite,* etc.) and of continuity (Carotti: 179) contribute in many ways to avoid prolixity and tedious delays. When it is sought to prove official action in a collateral way, and the right to hold the office is not the gravamen of the issue, then it is sufficient to show that the person *acted* as such officer without showing his eligibility, election, certificate, oath and bond and all the details of his qualifying and accepting the position. 1 Gr. Ev. 41, n., 83, 92, 105; 1 Dill. Corp. 238; S. v. Roberts, 52 N. H. 492, 1 Green, Crim. Rep. 157.

General reputation is sufficient to prove official action. McCoy, 9 Wend. 17, 24 Am. Dec. 113; C. v. Gannett: 213*g*; notes, 2 L. ed. (U. S. Rep.) 101. This rule is well expressed in S v. McNally, 34 Me. 210, 56 Am. Dec. 650, n.; 1 Bish. Crim. Proc. 1130, 2 *id.* 1130, 1131; 1 Dill. Corp. 238, 276, n.; Cobbey, Replev. 1008.

Assumed character of an officer or one acting in a certain capacity is an admission that he is such, and he is estopped from denying this. 1 Gr. Ev. 195; 2 Whart. Ev. 1152-1153; 1 Dill. *Presumption of appointment.* 1 Dill. Munic. Corp. 213, 238. *Allegans,* etc.

Prolixity is objectionable in pleadings. Sturges; Cryps; also in appellate procedure; R. R. v. Stewart: 290*a*; and also in evidence, as above illustrated in C. v. Kane. To charge one, as husband, for necessaries furnished the wife, it is sufficient to show she was held out and treated as a wife, and that the creditor acted upon these appearances; but in a divorce proceeding all of the facts relating to the marriage must be established.

Unlawfully withholding a thing in question raises presumptions against the wrongdoer. Armory: 180.

In appellate procedure, the best evidence to prove a matter is that expressly provided for, and agreeably to the maxim, *Expressio unius est exclusio alterius, e. g.,* what must be proved relating to due process of law must appear from the mandatory record, while matter of less dignity, not imperative or mandatory, must be proved by the statutory record (bill of exceptions). Relating to these records the rule is strictly applied that, "what ought to be of record must be proved by record and by the right record." Elsewhere we dwell upon the importance and

Leading Cases.—183. C. v. Kane. distinctions and independent and exclusive functions of these records. §§ 83-123, Gr. & Rud. Relating to these are masses of conflicting cases. This fact indicates their importance.

General mode of pleading is sometimes permitted to avoid prolixity. Cryps. See PROLIXITY; Sto. Pl. 253. But conclusions of law are not permitted. Cruikshank; J'Anson; *De non apparentibus,* etc.; Rushton: 5.

Necessity lies at the base of the exception to the rule requiring the best evidence. Necessitas inducit privilegium quoad jura privata; 1 Gr. Ev. 83; 1 Wh. Ev. 77-85. It influences many rules of pleading, evidence and procedure. 1 Bish. Cr. Proc. 7, 493-498; *Res ipsa loquitur;* Calye's.

All evidence possible on a point is not required; more than is required is surplusage; nor are weaker degrees of evidence excluded. Wright v. T.; U. S. v. Gooding; 1 Gr. Ev. 82; *Lex neminem cogit ad vana seu inutilia peragenda;* "Things equal to the same thing are equal to each other."

Appointment of a public officer; may be proved generally by showing he has acted as such. C. v. Kane; *Omnia præsumuntur rite,* etc., applies; 1 Gr. Ev. 83-92; 2 Best, Ev. 356, 489; 1 Wh. Ev. 653; 2 Bish. Cr. Proc. 1130, 1131.

That one made and delivered a note by implication avers its regularity and sufficiency. Campbell, 10 Wall. 421. Prolixity should be avoided. Sturges: 111.

Exceptions to rule requiring the best evidence; written appointment to office. C. v. Kane. Public Books. 1 Gr. Ev. 91; 1 Wh. Ev. 77-127. Collateral writings; may be proved orally. 1 Gr. Ev. 89.

Exceptions to rule rejecting hearsay. See HEARSAY; Doe v. Didsbury.

Examined and sworn copies of public records; admissible wherever official copies are, for "things equal to the same thing are equal to each other." Cheatham, 113 N. C. 161, 37 Am. St. 617, n.; 536. See SWORN COPY, *post.*

Voluminous facts. 1 Gr. Ev. 93; 1 Wh. Ev. 80.

Lost documents; secondary evidence admissible to prove, after diligent search. 1 Gr. Ev. 558; 1 Wh. Ev. 129-151; 2 Best, Ev. 472-491; Bagley, 9 Cal. 430, note, 64 Am. Dec. 687; 61 Am. Dec. 299.

Production of documents; original telegrams must be produced. *Sub,* R. v. Gibson. Telegrams; production of. 15 Fed. 725.

Preliminary proofs requisite. Bagley, *supra;* Fletcher, 23 Vt. 581, 56 Am. Dec. 98; Galbraith, 3 Cold. (Tenn.) 267, 91 Am. Dec. 281. Order of court upon application, essential. Galbraith, *supra.*

Pleadings; records upon proof, discretionary with court. Cook v. Burnley (1867), 11 Wall. (U. S.) 672 (but it would be abuse of discretion to deny). Must be supplied: Campbell v. Greer; a lost indictment may be supplied. *Sub,* Owen v. Weston.

Leading Cases.—183. C. v. Kane.

Commercial paper; if lost, recovery on may still be had. Bridgeford, 34 Conn. 546, 91 Am. Dec. 744, n.; 2 Pom. Eq. 831.

Lost documents; relief in equity, concerning. Bisph. Eq. 177; 1 Pom. 71; 1 Story, 81-89.

Records; judicial writings; official certificates. 1 Gr. Ev. 470-498.

Public and private writings; classification, 1 Gr. Ev. 470; Wh. Ev. 89.

Inspection of public documents. Ferry, 12 Vroom. (N. J.) 332, 32 Am. Rep. 219, n.; Webber, 43 Mich. 534, 39 Am. Rep. 213, 29 Am. Law Reg. 60; 1 Gr. Ev. 471. *Copies when admissible to prove,* 1 Wh. Ev. 89; 2 Dill. Corp. 303.

Right to inspect public records; Caswell, 18 R. I. 835, 49 Am. St. 814, 27 L. R. A. 82-85, n.; Upton, 17 Colo. 546, 17 L. R. A. 282, n.; Bett, 73 Md. 289, 10 L. R. A. 212, n. *Records of United States courts, how proved.* See AUTHENTICATION.

Inferior courts; distinctive rule. 1 Gr. Ev. 473.

Inspection; when a court will order. Res ipsa loquitur. 1 Wh. Ev. 742-756; Townsd. Libel, 269; 1 Gr. Ev. 477, 478; 17 Cyc. 290-295.

Oyer and profert; practice relating to. And. Steph. Pl. 159; 1 Chit. Pl. 446-450. Codes generally provide for inspection of premises and of documents, books, papers, etc.

Order to produce books; power of court to compel party to produce books and papers as evidence, or for the examination of his adversary. Lester, 150 Ill. 408, 41 Am. St. 375-396, ext. n.; 1 Gr. Ev. 559; 1 Wh. Ev. 750.

Examination before trial; discovery; right to knowledge dehors the record to prepare for trial. 8 Encyc. Pl. & Pr. 36-59.

Quasi public record; corporation books. These are for members of corporation only. 1 Gr. Ev. 474; 1 Wh. Ev. 661.

Corporation books are for its members, not strangers. Legendre, 45 La. 669, 6 Am. R. R. & Corp. Rep. 392-395, ext. n. See Byers, 13 Colo. 22, 25, Corporations; 1 Gr. Ev. 474.

Entries in corporation books; not evidence against strangers. *Expressio unius,* etc. C. v. Kane: 1 Wh. Ev. 661-663; 2 Dill. Corp. 300, 301.

What ought to be of record must be proved by record and by the right record. Iverslie: 46: cases; Wright: 28; *Expressio unius,* etc.; Indianapolis v. Imberry, 17 Ind. 175, 179; Co. Comm'rs, 8 Ind. 504-507; Trustees, 9 Ind. 458; Jordan v. School District (1854), 38 Me. 164; 1 Beach, Pub. Corp. 377, 378; Munday: 79; cases; School District, 115 Pa. 559; 1 Dill. Munic. Corp. 301; Planing Mill Co.: 2*d*; Campbell v. Greer, 2*a*.

Public corporations must comply with the law. This is mandatory. School District, *supra;* Hunt v. Wimbledon Local Board (1878), 3 C. P. D. 208-215, 4 C. P. D. 48-62, 16 Rul. Cas. 237; Young v. The

Leading Cases.—183. C. v. Kane.

Mayor, 8 Ayp. Cas. 517-529, 16 Rul. Cas. 654, n. *Counties; quasi-municipal corporations; must strictly comply with the law.* Note, 68 Am. Dec. 292, n.; Hunt, *supra.*

Proceedings in taxation must be of record and so proved. Lawrence: 132; Marx: 126; Moser; Iverslie: 46: cases; Rustin (Colo.): 134.

Judicial records; functions and purposes of; are exclusive in their domain. Windsor: 1; Russell: 27; Kingston's Case; Wright; Lea; Ransom: 122.

Historical works. 1 Gr. Ev. 497; 1 Wh. Ev. 664.

Legislative acts; statutes. 1 Gr. Ev. 480; 1 Wh. Ev. 288, 635 (statutes often regulate this). *Legislative journals.* Union Bank of Richmond, 119 N. C. 214, 34 L. ed. 487, 93 Cas. cited; 1 Gr. Ev. 482, 491; 1 Wh. Ev. 637. *Are not conclusive.* See DUE PROCESS OF LAW; CONSTRUCTION.

Are disputable. See *Omnia præsumuntur rite,* etc.; *Cessante,* etc.

Certificates of officers; include no fact not designated by law. *Expressio unius,* etc. 1 Gr. Ev. 498; 2 Wh. Ev. 841.

Official registers; need not be designated by law as such; it is sufficient if they were kept as such. 1 Gr. Ev. 496, 485.

Records; force and effect of. 1 Gr. Ev. 483, 485, 496; 1 Wh. Ev. 639, 648. *Registers of official character.* 1 Gr. Ev. 485, 496; 1 Wh. Ev. 644. *Statutes; how proved.* 1 Gr. Ev. 500; 2 Wh. Ev. 758-841.

Exemplifications of patent; grants; records; surveys; plats; maps, etc. See COPIES.

Judicial writings; judgments. 1 Gr. Ev. 499-556; 1 Wh. Ev. 98-128; 2 *id.* 758-841; Mills v. Duryea: 57.

Returns of officers. Hauswirth: 51; McDonald, 31 Mo. 29, 77 Am. Dec. 631.

Pleadings; their relation to evidence. Outram: 25; Bissell: 42; See Boileau: 43; Dickson: 34. ADMISSIONS.

A party is estopped by the allegations of his own pleadings. Stearns, 88 Va. 992, 29 Am. St. 758, n.; Knoop, 102 Mo. 291, 22 Am. St. 777; Wilcoxen, 27 Cal. 228, 87 Am. Dec. 66; Bailey: 44; Terry.

Admissions in pleadings. Bissell: 42.

Lost records; may be proved like any other document. Eakin, 10 Sm. & M. 770, 48 Am. Dec. 770, n.; 1 Gr. Ev. 509; 1 Wh. Ev. 129; 2 Best, Ev. 472-491. *Executions, if lost, may be substituted.* Herm. Ex. 87. *Or a lost judgment.* 1 Freem. Ex. 18. *Lost wills, also.* Brown, 27 L. J. Q. B. 173-180; 8 El. & Bl. 876, 92 E. C. L. R., 11 Rul. Cas. 491. *Evidence to establish lost or destroyed wills.* Clark, 50 Neb. 290, 38 L. L. A. 432-458, ext. n. Lost pleadings may be substituted. 1 Encyc. Pl. & Pr. 508; Campbell v. Greer, 2a; Owen v. Weston.

Judgments; admissibility and effect of a judicial record. Marrott; 1 Gr. Ev. 522; 2 Wh. Ev. 758-841; Wagner: 290.

Leading Cases.—183. C. v. Kane.

Res adjudicata; conclusiveness of judgments generally recognized, except in cases *in rem. Audi; Kingston's Case:* 76; 1 Gr. Ev. 525; 2 Wh. Ev. 814. See *Res Adjudicata.*

Parties to judgments; are both nominal and real. Bauerman: 48; *Kingston's Case;* 1 Gr. Ev. 523, 535; 2 Wh. Ev. 758.

Res inter alios acta. Privity; what is. 1 Gr. Ev. 536; 1 Wh. Ev. 750. Estoppels must be mutual; both sides are bound, or neither. Kingston's; 1 Gr. Ev. 524.

Public acts of state; laws, how proved. 1 Gr. Ev. 479; 1 Wh. Ev. 287, 635.

Judicial notice. Lanfear: 181. *Almanac; admissibility to prove hour of moonrise. Res inter alios,* etc. *Federal government and states: Judicial notice.* 1 Gr. Ev. 490.

Records; copies; when admissible. 1 Gr. Ev. 479; 1 Wh. Ev. 287, 635. *Sworn copy sufficient.* Lynch, 3 Salk. (Eng.) 154, 11 Rul. Cas. 450, n. (document, must be public); Doe d. Gilbert v. Ross (1840), 7 M. & W. 102-125, 11 Rul. Cas. 472, n. (there are no degrees of secondary evidence). See "Things equal to the same thing are equal to each other." 1 Wh. Ev. 94; 1 Gr. Ev. 485, 498, 507, 508. See EXAMINED AND SWORN COPY, *supra.*

Office copy; proof by attested copy not exclusive. "Things equal to the same thing are equal to each other." 1 Gr. Ev. 495, 498, 507-508; Stark. Ev. 257-272.

Foreign laws; how proved. 1 Gr. Ev. 486; 1 Wh. Ev. 300-308; 2 Phil. Ev. 416-437.

Sister states statutes. May be proved by lawyers or by deposition. *Mills:* 57; *Biesenthall,* 1 Duvall, 329, 85 Am. Dec. 629.

Records of sister states. Modes of attestation. Mills: 57; 1 Gr. Ev. 506; Stark. Ev. 257-272. AUTHENTICATION.

Proofs of records. 1 Gr. Ev. 501; 1 Wh. Ev. 94. *When record itself is admissible.* 1 Gr. Ev. 502, 91.

Records of the courts of sister states. Mills: 57; 1 Gr. Ev. 504; 2 Wh. Ev. 801-809; Wilcox 1, 96 Minn. 219, 5 L. R. A. N. S. 938-984 ext. n.

Private writings; general discussion of. 1 Gr. Ev. 557-584; 1 Wh. Ev. 614-756.

Attesting witnesses must be called, when. Garrett, 53 Ohio, 582, 35 L. R. A. 321-352, ext. n.; 1 Gr. Ev. 569-576; 1 Wh. Ev. 723-740.

Lost documents; requisite proof to show. 1 Gr. Ev. 558; 1 Wh. Ev. 129; 11 Rul. Cas. 455-457. Presumed stamped until contrary is shown. 11 Rul. Cas. 459-472.

Lost wills; what proof of required. 1 Tay. Ev. 406.

Lost records; production; how secured. 1 Gr. Ev. 559; 1 Wh. Ev. 152-163. Court may order an inspection. 1 Gr. Ev. 559; 1 Wh. Ev. 750.

Production; inspection of documents; profert and oyer. By bill of discovery. 2 Tay. Ev. 1586-1611; 2 Best, Ev. 624-630; 2 Wh. Ev. 724-756; 6 Encyc. Pl. & Pr. 730-818. View of premises. *Res ipsa*

Leading Cases.—183. C. v. Kane.

loquitur. When witness is not bound to produce. 1 Tay. Ev. 428-430.

Notice should be served on party, or his attorney, before trial. 1 Gr. Ev. 562; 15 Fed. Rep. 721. And it would seem that twenty-four hours notice should be given; this time is given for a subpœna *duces tecum.* Papers may be called for at the hearing and not before; generally their admission is compulsory. 1 Gr. Ev. 563; 1 Tay. Ev. 1614.

Documents possessed by adverse side, production of. R. v. Elworthy, *sub,* PRODUCTION. 1 Gr. Ev. 560-563; 2 Tay. Ev. 410, 1613, 1615; 1 Wh. Ev. 737.

Notice to produce papers. 1 Gr. Ev. 561.

Unnecessary in three cases: 1. When the instrument is a duplicate; 2. When the action is itself a notice; 3. When the pleadings charge the defendant with possession. *R. v. Elworthy;* 1 Gr. Ev. 561; 15 Fed. Rep. 721.

Seven cases; Exceptions in. 1 Tay. Ev. 419-426.

Admission of party will dispense with. 1 Gr. Ev. 96-97; Queen's Case: 53*a*.

Production of documents; Lowenstein, 12 Fed. Rep. 811 n.; § 724 R. S. U. S. *Wertheim,* 15 Fed. 716-730, ext. n. cas. Adams Eq. 135.

Right of party producing upon notice to use and control. Smith, 131 N. Y. 169, 15 L. R. A. 138 n. *Discovery; bills of. Sub, Ubi jus,* etc. 6 Encyc. Pl. & Pr. 730-818.

Alterations; Explanations of to be made. *Master v. Miller;* 1 Gr. Ev. 564; 1 Wh. Ev. 621-632.

Alterations; holder of document must explain, because such facts lie peculiarly within his knowledge. Master: cases.

Immaterial alterations. De minimis non curat lex. 1 Gr. Ev. 567; 1 Wh. Ev. 623, 627.

Alterations by consent. Master. Nihil tam conveniens. 1 Gr. Ev. 568*a;* 1 Wh. Ev. 624.

Filling blanks in deeds, Hibblewhite; 1 Gr. Ev. 568*a*. In commercial paper, Angle.

Proof of documents: By subscribing witnesses, 1 Gr. Ev. 569-582; 1 Wh. Ev. 723-740.

Ancient instruments; Prove themselves. 1 Gr. Ev. 570, 20-21: 1 Wh. Ev. 631.

Ancient deeds; their admissibility. Davidson, 86 Ky. 397, 9 Am. St. 295-304, ext. n.; Marsh, 2 Esp. 665-666, 5 R. R. 763, 11 Rul. Cas. 508*a*. See ANCIENT INSTRUMENTS.

Handwriting; how proved. 1 Gr. Ev. 573*a*-582.

Knowledge of handwriting is gained,

1. By seeing the person write;

2. By corresponding with him; 1 Gr. Ev. 577-578; 1 Tay. Ev. 1661;

3. Knowledge by comparison; Hanley: 204; 1 Gr. Ev. 579.

Handwriting, proof of by comparison. 1 Gr. 576; 1 Wh. Ev. 705-722.

Leading Cases.—

184. McCAUGHEY v. SCHUETTE (1897), 117 Cal. 223, 59 Am. St. 176, n.

Evidence should not be pleaded. Green: 90. Matter of evidence should not be pleaded. See JUDICIAL NOTICE. Exceptions to this rule are found in applications for *ex parte* or mandatory injunctions, specific performance, *res adjudicata* and abatement pleas.

185. BONNELL v. WILDER (1873), 67 Ill. 327. See Cothran; Nepean; BURDEN OF PROOF; *Actore.*

Cited, §§ 21, 103, 112, 155, 209, 319, 350, Hughes' Proc.

Cited, §§ 224, 270*a*, 271, 272, Gr. & Rud.

Evidence; Burden of proof. One witness unimpeached is sufficient to prove a fact, and such a witness and a presumption cannot be overcome by one witness only. Bonnell; C. v. McKie: 187; Dunlap; 105 Mo. Ap. (one witness standing fair proves a fact). A preponderance is sufficient and jury must accept it. Willis, 90 Tex. 617, 59 Am. St. 42, n. Presumption in one's favor is wholly overcome if contradicted by one witness; so held in Pullman, etc. Co., 3 Colo. App. 540, 544 (extreme case).

Court finds and controls issues when there is either no evidence or insufficient evidence to submit to them. McDermott v. Severe; Citizens' Ry.: 186; Brown, 81 N. C. 245, Huff. & W. Conts. 395; Schuermann, 161 Ill. 437, 52 Am. St. 377, n.; Klein v. S. (1894), 9 Ind. App. 365, 53 Am. St. 354; S. v. Waller (1879), 80 N. C. 401; S. v. Patterson (1878), 78 N. C. 470; Sutton, 2 Jones (N. C.) 320; Cobb, 23 N. C. (1 Ire.) 440; Dant v. S.; 212.

Directing a verdict is a duty, where there is no evidence or it is inconsequential, and where no recovery can possibly follow. Hodges, 104 Fed. 745. And if this is error, it is harmless in such cases. *De minimis,* etc. *Lex neminem cogit ad vana,* etc.; 2 Encyc. Pl. & Pr. 587; 6 Encyc. Pl. & Pr. 668-705 (general *resume;* Merchants' Bk. (citing Ryder v. Wombwell); Wheelton v. Hardisty; McAfee v. Reynolds.

Where a civil action is being tried by a jury, although there may be evidence to go to the jury, yet if the proof is such that the jury could not reasonably give a verdict for the plaintiff, the judge may withdraw the case from the jury and direct a nonsuit; or according to modern practice, give judgment for the defendant. McDermott; Hiddle, A. C. 372-376, 65 L. C. P. C. 24, 15 Rul. Cas. 64, n, 11 Mews' E. C. L. 470: cases; Wheelton, 8 El. & B. 252; 92 E. C. L. R., stated, 15 Rul. Cas. 68, 8 Mews' 4; Southern Ry. Co., 86 Fed. 292, 40 L. R. A. 746.

Where there is no evidence to sustain a fact the court should say so; it should not assume there is. Bynon v. S. (1897), 117 Ala. 80, 67 Am. St. 163; Merchants' Bank; Citizens R. R.

Nonsuit. 6 Encyc. Pl. & Pr. 823-1004.

Leading Cases.—185. Bonnell.

Directing a verdict. Coughlan, 164 U. S. 301-311 (44 L. ed. 442: cases). Ordering a nonsuit and directing a verdict are in substance the same. Oscanyan: 41. Courts should order nonsuits and direct verdicts; in civil cases *it is their duty. Ad quæstionem.*

Commercial paper; possession of; evidence of title. Res ipsa loquitur (the thing speaks for itself); 1 Best, Ev. 196, 214, 2 *id.* 293-471; Pettee v. Prout, 3 Gray (Mass.), 502, Redf. & Bigl. Lead. Cas. N. & B. 217, 63 Am. Dec. 778. *Bona fide* holder of bill or note. Pettee, *supra,* Clark, 61 Kan. 526, 78 Am. St. 337.

Possession of cash or of a bill or note is prima facie proof of ownership. Berney, 108 Ala. 111, 54 Am. St. 144, n. And that a bill or note is unpaid. Bonnell; Pettee, *supra;* Dunlap, 105 Mo. Ap. 1. Possession of real estate gives notice of occupant's rights. Williamson v. Brown; Fair v. Stevenot. It is presumed when a bill or note is paid, that it is surrendered. 3 Rand. Com. Pap. 1415; Robertson, 28 Ill. 161, 81 Am. Dec. 267-270, n.: cases (an unimpeached and uncontradicted witness cannot be disregarded). A juror is bound by the evidence introduced and cannot act upon his personal knowledge and beliefs. S. v. Gaynon (1895), 44 S. C. 333, 31 L. R. A. 489-497, ext. n.; *Ad quæstionem facti,* etc.; §§ 89-103, Hughes' Proc. See Kilpatrick, 6 Colo. App. 407.

Possession by the maker of commercial paper is prima facie proof that he has paid it. Cassem, 201 Ill. 208, 94 Am. St. 160: cases.

If there is sufficient evidence to place the case within the province of the jury, then their findings are conclusive. Warner, 113 Cal. 105, 54 Am. St. 327, n.; City Ry., 194 U. S. 201.

A presumption in one's favor is sufficient to found a recovery upon. S. v. McNally (1852), 34 Me. 210, 56 Am. Dec. 650, 652. (more than enough should not be required). And this right is important. Presumptions of guilt, innocence, continuity, failure to testify as to facts within knowledge are all to be considered, weighed and acted upon. R. v. Almon; New Orleans, 10 Pet. 662, 771; Nepean v. Doe (limitations); Smith v. Burrus.

"The doctrine of presumption is as fully recognized in the civil as it is in the common law. It is a principle which no enlightened tribunal, in the search of truth and in applying facts to human affairs, can disregard." New Orleans v. U. S. *supra;* U. S. v. Chaves (1895), 159 U. S. 463; Fletcher v. Fuller (1886), 120 U. S. 534; 97 U. S. 268: cases.

Life, liberty and property often depend on no more than a presumption. This should be well comprehended. Carefully consider Rushton, Moore v. C., Dovaston, Ransom, Harvey, Hannah, Bonnell. Verba fortius, etc.

Refusal to find facts from requisite allegations and proofs is error. McLaughlin; Farmers', 150 N. Y. 410, 34 L. R. A. 76; Callanan, 107 N. Y. 360 (court, if requested, will state its findings). A recovery must follow pleadings and proofs. Kingston's: 76; Ashby, 1 Rul. Cas. 521 (Action; right of; 2 *id.* 521). *Ubi jus,* Bro. Max. 191-211; Winsmore; Lumley; Sasportas; 1 Wat. Tres. 13, n., Cool. Torts, 71; Windsor: 1; Sto. Pl. 849. See Cothran.

Number of witnesses and amount of testimony required to prove certain issues. 1 Gr. Ev., §§ 255-274; 1 Wh. Ev. 414-416; 2 Tay. Ev. 869-891; 17 Cyc. 754-781.

Nine witnesses against one, and a signature, prevail. Ad quæstionem, etc. *Handwriting; its force and effect as evidence;* right of jury to compare, weigh and pass upon. Hanley; *Ad quæstionem,* etc.; Arnold v. Cost (1831), 3 Gill & John. (Md.) 219, 22 Am. Dec. 302-321, ext. n.; C. v. Kane.

Treason and perjury have distinctive rules. 1 Gr. Ev. 256-257; S. v. Shupe (perjury).

Equity; positive denials in sworn answer, not overcome by one single uncorroborated witness. Cook, *sub,* U. S. v. Drew; 1 Fost. Fed. Prac. 82, 84 (important rule. See DENIALS). Vigel, 104 U. S. 441; Ropes v. Jenerson.

Number required in equity. 1 Encyc. Pl. & Prac. 939; Boileau: 43.

Equity—causes; findings of jury not conclusive as at law. Green, *sub,* Marbury; Miller, 135 Ill. 190, 10 L. R. A. 292.

Reasonable doubt in criminal cases. 11 Crim. Law Mag. 1-46; C. v. McKie: 187; Billard v. S.: 189; Hodge v. S. (1892), 97 Ala. 37, 38 Am. St. 145; Carlton v. P. (1894), 150 Ill. 181, 41 Am. St. 346, n.; Burt v. S. (1894), 72 Miss. 408, 48 Am. St. 563-579, ext. n.; S. v. Gleim (1895), 17 Mont. 17, 52 Am. St. 655: cases; *C. v. Webster* (1850), 5 Cush. (Mass.) 295, 818, 324, 52 Am. Dec. 711-739; stated, 1 Best, Ev. 201, 2 *id.* 297, 4 Wigm. Ev. 2497, 17 Mont. 31, 52 Am. St. 664; cited, 3 Gr. Ev. 14, 25, 29, 130, 144, 1 Gr. Ev. 49, 56, 72, 446, 718, 2 *id.* 1263, 1 Best, Ev. 201, 2 *id.* 297, Kerr, Hom., *q.v.,* Burr, 96, 2 Green, Crim. Rep. 434, cited, §§ 272, 294, Gr. & Rud. May v. P. (1871), 60 Ill. 119, 2 Green, Crim. Rep. 555, Whart. Crim. Ev. 1: Bachman v. P. (1885), 8 Colo. 472; Hipp v. S. (1839), 5 Blackf. 148, 33 Am. Dec. 463; And. Dic. (DOUBT); 12 Cyc. 491; 4 Wigm. 2497-2498.

High degrees of reasonable doubt required in criminal cases, and also in a few civil cases. Clear and convincing proof is required in specific performance also. Equitable exceptions to statute of frauds in those cases proved by "act and operation of law." Lyon, 13 Mees. & Wels. 385, 3 Gray, Cas. Prop. 254. Possession under

Leading Cases.—185. Bonnell.

statute of frauds. Twyne's Case. Or when wife permits husband to use her property as his own and thus gain credit upon, she then claiming against such creditors. Stanton, 6 Wis. 338. That an absolute deed is a mortgage. *Sub,* Pym: 452; Davies, 17 C. B. 625; Furness v. Meek (1857), 27 L. J. Exch. 34.

Preliminary examinations; rule of reasonable doubt does not apply to. Marks, 8 Utah, 406, 26 L. R. A. 590.

Innocence is presumed until contrary is proved. Coffin v. U. S., 156 U. S. 432; 2 Bish. Crim. Proc. 1103-1106; 4 Crim. Law. Mag. 643-661, 845-864; C. v. Gerade (1891), 145 Pa. 289, 27 Am. St. 689, n.; Fisher v. McGirr. Evil is not presumed. *Actore,* etc.; *Semper præsumitur pro negante.*

Crime must be laid. Cruikshank; Moore v. C.; Burton v. U. S. And proved. Fisher v. McGirr, *supra;* C. v. McKie: 187; 1 Bish. Cr. Proc. 1103-1108.

Negligence is not presumed. McCully: 206; Kearney: 211, *sub, Res ipsa loquitur.*

Burden of proof devolves upon the party who holds the affirmative. Actore; Semper præsumitur; Nepean v. Doe; 1 Gr. Ev. 74-81; City Ft. Smith, 51 Ark. 447, 13 Am. St. 62, n.; Boulden, 119 Ind. 574, 12 Am. St. 453, n.; Hazell, 95 Mo. 60, 6 Am. St. 22, n.; Bliss, 393, 395, 3d ed.

In an action to quiet title a plaintiff must allege that he is in possession and claims as owner. A defendant must do more than deny these jurisdictional averments, else they will be presumed true. Wall. 17 Colo. 476. (Singular).

Burden of proof generally. 1 Gr. Ev. 74-91; 1 Ell. Ev. 128-142; 1 Wh. Ev. 353-371; 4 Wigm. Ev. 2483-2539; Citizens' Ry.: 186.

In criminal cases. C. v. McKie; 1 Wh. Ev. 357; And Steph. Pl. 175: cases. See NEGATIVE AVERMENTS.

When facts lie peculiarly within one's knowledge, he must adduce his proofs, as that a holder of a suspicious document must explain an alteration. If fraud is shown in the inception of a bill or note, then the holder must prove he is innocent, a *bona fide* holder. Lake, 61 Minn. 96, 52 Am. St. 538, n.

Corpus delicti must be proved in felonies. Matthews v. S.: 193; Bish. Cr. Proc. 1056-1060; 4 Wigm. Ev. 2072-2074.

Evidence may be admitted after arguments are commenced. Burt v. S. (1897), 38 Tex. Crim. Rep. 397, 39 L. R. A. 305; Wells, Quest. Law, 792. See DISCRETION; *De minimis,* etc.

Order of proof is in discretion of court reasonably exercised. 1 Gr. Ev. 51*a; Res inter alios,* etc.; Village, 23 Neb. 662, 8 Am. St. 144, n.; *Consensus;* 8 Encyc. Pl. & Pr. 156-302; 1 Bish. Cr. Proc. 966. Court can not dictate order of proof. Lewis, 95 Mo. 26, 3 Am. St. 511; C. v. Hunt; C. v. Eastman. See order in Piper: 114; 4 Wigm. Ev. 1866-1900.

Right to begin argument follows same order as proof. Viele, 20 Iowa 9, 96 Am. Dec. 83, n. Argument follows same rights as burden of proof. Elwell, 31 N. Y. 611; Fry, 28 N. Y. 324; R. v. Berens, 4 F. & F. 842; R. v. Burns, 16 Cox C. C. 195; 1 Ell. Ev. 130.

Right to begin; to open and close a case. Generally this devolves on the party who must in the first instance give evidence before he can recover. *Actore.* 1 Whart. Ev. 357; Amos v. Hughes (1835), 1 Moody & Rob. 464; 1 Gr. & Ev. 74, n., 269, n.; Preston, 26 Iowa, 205, 96 Am. Dec. 140, n.; 3 Sedgk. Dam. 1286. Refusal of rights is error. But may be immaterial. Note, 82 Am. Dec. 139; *De minimis,* etc. (the law does not concern itself about trifles); Bro. Max. 142, 147; 14 Ir. L. T. 258; And. Dic., 615; 1 Bish. C. L. 212-215.

In criminal cases burden of proof always devolves upon the prosecution. C. v. McKie: 187.

Insanity. See INSANITY. S. v. Marler: 188; P. v. Rogers: 198; C. v. Rogers: 199.

Civil and criminal cases; distinctions as to proof required. See PREPONDERANCE OF EVIDENCE; REASONABLE DOUBT.

Forgery; civil case. Clear and convincing proof required. Oliver, 119 Ill. 532; affirmed, 110 Ill. 119, 123. See First National Bk., 30 Neb. 104.

Preponderance of evidence is sufficient in a civil case although a criminal act is in issue. Kurz v. Doerr, 180 N. Y. 88, 105 Am. St. 716, n.; *Contra,* Cases.

Negative allegations. Who must prove. See NEGATIVE ALLEGATIONS; 1 Gr. Ev. 79; Pom. Rem. § 671; 1 Whart. Ev. 356-358. One averring fraud against an officer must prove it. *Ex dolo;* Colorado Co., 123 U. S. 307.

Negative and positive proof; respective value of. Moak, Underh. Torts, 321, 322: cases; Bates, 47 Vt. 2; City of Greenville, 78 Ill. 150; Bradley, 45 N. Y. 422; *Unius testis;* 17 Cyc. 808, 809.

Province of court and jury; in passing upon fact. Ad quæstionem, etc.; S. v. Croteau: 271; S. v. Burpee (1892), 63 Vt. 134, 36 Am. St. 775-802, 19 L. R. A. 145-157, n. Overrules S. v. Croteau; 156 U. S. 86. Directing a verdict is often the peremptory duty of a court. *Ad quæstionem,* etc.; *Consensus,* etc.; 6 Encyc. Pl. & Pr. 667-707.

Facts admitted; courts must pass on as if an agreed statement of facts. Bank, 20 Mont. 379, 63 Am. St. 628: cases; Hopper: 4; Hughes' Conts. 5; Dickson: 34: cases.

Cancellation for fraud; it must be proved fully, clearly and explicitly. Rupert, 1 Rich. (31 S. C.) 101. See REFORMATION; RESCISSION.

Issues properly joined; Burden on affirma-

Leading Cases.—185. Bonnell.

tive. Simonton, 5 Pet., 141, 149 8 L. ed. 75. See BURDEN OF PROOF; Nepean v. Doe; *Actore,* etc.

186. CITIZENS' STREET R. R. v. STOCKDELL (1902), 159 Ind. 25.

Cited, §§ 19, 27, Hughes' Proc.

Cited, §§ 144, 158, 202, 205, 232, Gr. & Rud.

Probatis extremis præsumuntur media; Limitations of. In an action against the railroad for negligence causing personal injury, the statement of claim showed plaintiff was a passenger on defendant's car on Senate Avenue. Every material allegation was denied. Claimant introduced in evidence a map showing tracks on that avenue, marked "Citizen's Street R. R." and a witness testified he was a motorman, and at the time of the accident was running a car on Senate Avenue. *Held,* on appeal that the evidence was insufficient to support the verdict. From these facts, the court would not presume, that all tracks and all cars on that street were the defendant's. *Actore,* etc. Hadley, J., dissents.

Actore, etc.; Hannah: 128; S. v. Dant.

Rules of the supreme court must be followed to secure a review. The action of the court in giving or refusing to give certain instructions will not be reviewed upon appeal, where neither the pages and lines of the record where instructions may be found, nor the substance of any of the instructions, are given, as required by the rules of the supreme court. § 53, Gr. & Rud.

Waiver; by failure to discuss error. Exceptions to the decision of the court upon the motion of the appellant for an order of court requiring the jury to make further answers to certain interrogations are waived by failure of appellants counsel to discuss them. *Consensus,* etc.

Rules of evidence are no less strict in civil cases than in criminal. 1 Gr. Ev. 65. See REASONABLE DOUBT. Hardeman, 12 Tex. Ap. 350; Bristow: 135.

Pleadings are strictly construed against the pleader. Verba fortius; 190 U. S. 546 (intimates that pleadings are more strictly construed than is evidence). Such views lead to bewilderment.

187. C. v. M'KIE (1854), 1 Gray (Mass.), 61, 1 Lead. Crim. Cas. (B. & H.) 295-310, ext. n., 61 Am. Dec. 410; stated, 3 Gr. Ev. 24, 2 Crim. Def. 394; cited, 1 Best, Ev. 213, 1 Bish. Cr. Proc. 1049; Lilienthals, 106 U. S. 237, 268. § 294, Gr. & Rud.

Burden of proof; reasonable doubt. Burden of proof in criminal cases rests on the prosecution, even of affirmative defenses; but otherwise in civil cases. McKyring: 331; Bonnell: 185; 17 Am. Law. Rev. 892; Loeffner v. S.; C. v. York; 1 Bish. Cr. Proc. 1048-1051, 1103-1106.

Test of burden of proof; plea of not guilty; right to open and close. 2 Crim. Def. 432-532: cases; Bonnell; 1 Bish. Crim. Proc. 1048, 1091-1095.

Leading Cases.—

188. S. v. MARLER (1841), 2 Ala. 43, 36 Am. Dec. 398-411, ext. n.; 2 Crim. Def. 346: cited, 2 Crim. Def. 1 Bish. Cr. Proc. 1108, 1141, 1170; 1195, 2 *id.* 629, 666 (insanity). Marler v. S. (1880), 67 Ala. 55, 68 Ala. 580; McClain, Crim. Law, 416-418 (motive for homicide). § 294, Gr. & Rud.

Insanity as a defense; insanity must be shown by clear and convincing proof. Jury must be satisfied beyond a reasonable doubt, of the defendant's sanity, or they should acquit. C. v. Rogers; P. v. Rogers; R. v. Oxford.

Witnesses; impeachment; impeachment of witnesses by proving contradictory statements. Foundation must be laid by asking whether or not, at a certain time and place named, the contradictory statement was made. S. v. Marler; *Falsus in uno.* Note, 73 Am. Dec. 764; 1 Gr. Ev. 462.

189. BILLARD v. S. (1867), 30 Tex. 367, 94 Am. Dec. 317, n. *Cited,* § 294, Gr. & Rud.

Larceny. Property must be taken with felonious intent to permanently deprive owner of it. Billard; S. v. Homes. General or special ownership is sufficient, if either is averred or shown. Billard v. S.

Reasonable doubt. Evidence in criminal cases must justify jury beyond reasonable doubt; preponderance of evidence, however great, is insufficient; unless clear and convincing it will seldom suffice. Billard; 1 Gr. Ev. 34, n. Burt v. S., 72 Miss. 408, 48 Am. St. 563-579, ext. n.; Lovett v. S., 30 Fla. 152, 17 L. R. A. 705, n.; 1 Bish. Cr. Proc. 1091-1095.

Venue. Proof of, by a preponderance of evidence, sufficient. 1 Bish. Cr. Proc. 383; Wilson v. S. (1896), 62 Ark. 497, 54 Am. St. 303, n.

190. R. v. PARTRIDGE (1836), 7 C. & P. 551 (32 C. E. L. R.); 2 Best, Ev. 211, 311, 1 Gr. Ev. 34, n., 3 *id.* 32, 2 Bish. Cr. Proc. 738-754, 1227, 2 *id.* 744, Whart. Crim. Ev., 2 Bouv. Dic. 843-844 (recent possession, etc.). 101 Am. St. 474-524, ext. n. *Cited,* § 334, Hughes' Proc.; §§ 293, 294.

Presumptions; circumstantial evidence. Recent possession of the fruits of crime is *prima facie* evidence of guilt. Possession two months after commission of event, sufficient to convict. Note, 38 Am. St. 894, 2 Best, Ev. 211: cases; S. v. Frahm, 73 Iowa 355, 7 Am. Cr. R. 132, n. (burglary); P. v. Flynn, 73 Cal. 511, 7 Am. Cr. R. 126, 5 Crim. Def. 523-534, 581-583: cases; Wilson v. U. S., 162 U. S. 613; *Res ipsa loquitur;* Williams v. S., 40 Fla. 480, 74 Am. St. 154, n. U. S. v. King: 192. See Huggins v. P (1890), 135 Ill. 243, 25 Am. St. 357-362, n.; Robb v. S. (1892), 35 Neb. 285; Blaker v. S. (1891), 130 Ind. 203, 2 Bouv. Dic. 843, 844.

191. PHELPS v. RACEY (1875), 60 N. Y. 10, 19 Am. Rep. 140, 7 Crim. Law Mag. 227; 9 L. R. A. 139, 8 Am. C. R. 311; 1 Ell. Ev. 86, 87.

Cited, §§ 293, 295, Gr. & Rud.

Leading Cases.—191. Phelps.

Statutory crime. Possesson of game during the closed season is. Dickhaut v. S., 85 Md. 451, 36 L. R. A. 765, 60 Am. St. 332, n., 7 Crim. Law Mag. 213-230; Maier, 103 Cal. 476, 42 Am. St. 129-141, ext. n.; S. v. Schuman, 36 Oreg. 16, 78 Am. St. 754. *Contra:* C. v. Hall, 128 Mass. 410, 35 Am. Rep. 387; S. v. McGuire, 24 Oreg. 366, 21 L. R. A. 478: cases; P. v. O'Neil, 71 Mich. 325, 8 Am. Cr. R. 302.

Such statutes are no interference with commerce. Geer v. S., 161 U. S. 519. And transportation of game may be prohibited. American, 133 Ill. 649, 9 L. R. A. 138; P. v. Buffalo Fish Co., 164 N. Y. 93, 79 Am. St. 622 (possession is only *prima facie* evidence).

Possession of certain property may be made criminal. Haggerty, 133 Mo. 238, 40 L. R. A. 151; *e. g.,* opium. Mon Luck, 29 Oreg. 221, 54 Am. St. 804, n.: S. v. Thomas: 257; S. v. Beach: 258; Adams v. New York, *sub, Nemo tenetur,* etc.; 98 Am. St. 675. *Intent immaterial in statutory offense.* P. v. Robey.

192. U. S. v. KING (1851), 5 McLean (U. S.), 208, 4 Crim. Def. 163, Laws. Lead. Crim. Cas. 109, 3 Gr. Ev. 103, 111. *Cited,* § 294, Gr. & Rud.

King stated: K. made spurious coin to use in magical performances and not to circulate as money. Held, not guilty of counterfeiting. Intent is an essential element. *Actus,* etc.; P. v. Robey.

Recent possession of fruits of crime. R. v. Partridge, *supra;* and of tools to make counterfeits, and of such sufficient. King; S. v. Weston (1833), 9 Conn. 27, 25 Am. Dec. 40; *Res ipsa loquitur; Res inter alios,* etc.

193. MATTHEWS v. S. (1876), 55 Ala. 187, 28 Am. Rep. 698-704. Cited, §§ 272, 294, Gr. & Rud.

Confessions. Corpus delicti must be proved in felonies; confession without this is insufficient. Cool. Const. Lim. 381. The *corpus delicti* can not be proved by a confession alone. See *Nemo tenetur.* 3 Gr. Ev. 19, 30, 131, 2 Best, Ev. 353, 439-451, 553, 8 Rud. Cas. 104; Bradford v. U. S., 104 Ala. 68, 53 Am. St. 24, n.; Dunn v. S., 34 Tex. Cr. Rep. 257, 53 Am. St. 714, n. The *corpus delicti* in larceny must be proved. R. v. Dredge, 1 Cox, C. C. 235.

Certainty of evidence essential. In embezzlement, proof of a general deficiency insufficient. *Sub,* R. v. Negus. *Ad quæstionem,* etc.; Citizens' Ry.: 186.

Death proved by circumstantial evidence: Hickory: 194.

Personal identity; identifying victims; uncertainties of. 2 Crim. Law Mag. 287-318.

Homicide; identity must be proved in. Ruloff, 18 N. Y. 179, 5 Crim. Def. 939; S. v. German, 54 Mo. 526, 14 Am. Rep. 481, 5 Crim. Def. 953, note, *Id.* 1142-1155; Campbell v. P., 159 Ill. 9, 50 Am. St. 134.

Infanticide. It must be shown child was murdered, and also that the mother did it. Harris v. S., 28 Tex. Ap. 308, 19 Am. St. 837, n.; R. v. Waters (certainty required).

Generally. See S. v. Williams, 7 Jones, Law (N. C.), 446, 78 Am. Dec. 248-259, ext. n.; Carlton v. P., 150 Ill. 181, 41 Am. St. 346; Willard v. S., 27 Tex. Ap. 386, 11 Am. St. 197; P. v. Palmer, 109 N. Y. 110, 4 Am. St. 423; 1 Bish. Crim. Proc. 1056-1059. *Conspirators: agents; confessions of.* U. S. v. Gooding.

194. HICKORY v. U. S. (1894), 151 U. S. 303, 317, 38 L. ed. 170, 160 U. S. 408, 40 L. ed. 474.

Cited, §§ 272, 294, Gr. & Rud.

Hickory stated: Sam Downing, *alias* Sam Hickory, with other Cherokee Indians, were indicted for murder of Joseph Wilson, a United States deputy marshal. H. alone was convicted. He claimed he killed Wilson in self-defense, but the evidence was weighty, showing that H. only wounded W. and that he was afterwards killed either by H. or by one Shade, with an axe, and this belief was greatly strengthened by a letter H. wrote to Ollie Hickory, alias Williams. H. denied the genuineness of this letter. For comparisons of handwriting other documents were introduced. The name of Snell, a witness, was not indorsed on the back of the indictment, as required under § 1033, R. S., but to this exception was not promptly taken. Johnson, a witness for H., gave damaging testimony, and it was sought to show that he had made contrary statements out of court. Exceptions were taken to the court's criticism on circumstantial evidence—"denouncing persons who are shown to act on circumstantial evidence as fools and knaves." *Held:*

1. *That papers shown to be genuine could not be introduced in evidence solely for the purpose of comparison, and stating exceptions (Hanley);* that writings specially prepared for comparison are inadmissible. (As to this an exceptional rule exists in federal courts.)
2. *That objection that the name of a witness is not on the back of an indictment must be aptly made.*
3. *That exceptions must be taken before the jury retires—before the mischief is wrought.* Notice must be given, that the court can promptly correct, and correct its errors, where these are waivable in character. "He who does not speak when he ought, should not be heard when he desires to speak." (Montgomery: 292; *Consensus.*
4. *Exceptions to instructions must be taken before the jury retires,* to enable the judge to correct error, and that the appellate tribunal may pass upon the precise question raised without being compelled to search the records to ascertain it. *Consensus.* § 53, Gr. & Rud.

Leading Cases.—194. Hickory.

5. *Exceptions must be several, distinct and certain.* Miller: 296. *Consensus; Expressio unius,* etc.

6. *That a party vouches for his witness,* and that at common law he cannot contradict his statements, except by leave of court. *Allegans.* See 1 Gr. Ev. 462.

7. *Circumstantial evidence is high and satisfactory, and is sufficient to sustain a conviction of murder.* Hickory; Dant S.; S. v. Halleck, 65 Wis. 147, 7 Crim. Law Mag. 643; Peltzner's Case, 4 Crim. Law Mag. 157-171.

Circumstantial evidence solely will be admitted to prove the contract in some civil causes, *e. g.,* the equitable exceptions to the Statute of Frauds. Lester. *Here it is recognized as the highest of evidence. Death may be proved by circumstantial evidence.* Starr v. U. S., 164 U. S. 627; Matthews v. S.

8. *Self-defense can be exercised only out of necessity.* The actor

"must not forget that he is judge, jury and executioner when he is sitting in that tribunal out in the woods or country. He is therefore required to comprehend what this law is. He is required to know what the facts are that confront him, and to make a correct application of that law to these facts, and if he does not do that when he might do it, he makes a mistake in that regard, and he would be guilty of manslaughter." Every man is presumed to know the law. U. S. v. Holmes; *Necessitas inducit privilegium,* etc.

9. *Premeditation in homicide may exist for an instant only*—"in the twinkling of an eye." C. v. York; Durant v. P., *sub.,* MALICE.

Instructions of judges must not be set out in hæc verba in bills of exceptions (statutory record). 150 U. S. 118; *R. R. v. Stewart,* 290*a*. Proxility is to be avoided.

A charge must not magnify and distort the proved facts. 160 U. S. 408. Limitations of power to comment. S. v. Whit (1858), 5 Jones' Law (N. C.), 224, 72 Am. Dec. 533-549. Reasons for this rule are found in S. v. Croteau: 271.

195. M'NAGHTEN'S (or M'NAUGHTEN'S) CASE (1843), 10 Clark & Fin. 200, 8 Eng. Rep. 718, 1 C. & K., 130 Me., 47 E. C. L. R. 130, 8 Scott, N. R. 505, 21 Cyc. 665. Beale, Crim. Cas. 45, 7 Crim. Law Mag. 567, 2 Crim. Def. 150, Law. Insan. Cas. 150, Am. Dic. 551, Clark, Crim. Cas. 95; Parsons v. S. (1887), 81 Ala. 577, 60 Am. Rep. 193, 9 Crim. Law Mag. 826; 160 U. S. 470; 8 Rul. Cas. 29, 41; 2 Bish. Crim. Proc. 671, 685; §§ 44-47, Hughes' Proc.; §§ 293, 294, Gr. & Rud.

M'Naghten's Case stated: M. killed Drummond and was acquitted for insanity. Great interest was taken in the case and Parliament asked the judges of the law, and they answered three leading questions propounded. A leading one of these was that experts attending the trial and thus learning of the case may give their opinion of the prisoner (*Cuilibet in sua,* etc.)

Leading Cases—195 M'Naghten's

Procedure. Insanity at or after trial. 2 Crim. Def. 881-919; cases; Baughn v. S., 100 Ga. 554, 38 L. R. A. 577-591, ext. n. (after commission of crime).

Theory of culpability. *Actus non facit reum,* etc. 10 Crim. Law Mag. 641-661, 805-862 ("Irresistible impulse"; "Moral insanity"; "Emotional insanity"; "Right and wrong test").

The defense of insanity. 2 Bish. Cr. Proc. 664-687, n., 7 Crim. Law Mag. 431-464, 567-600, 12 *id.* 1-12 (insanity and criminal responsibility); Davis v. U. S., 160 U. S. 469; P. v. Hubert, 119 Cal. 216, 63 Am. St. 72-108, n., 2 Crim. Def. 1-919, n. See C. v. Rogers: cases; 1 Bish. C. L. 374-398*a* (liability of insane persons); Knights v. S., 58 Neb. 225, 76 Am. St. 78-97 ext. n.

Presumption of sanity until the contrary is shown. Bro. Max. 15. See S. v. Marler: cases; C. v. Rogers; C. v. McKie: cases; Loeffner v. S., 10 Ohio St. 598, 2 Crim. Def. 432, Laws. Insan. Cas. 832; *cited,* 2 Crim. Def. Hor. & Thomp. Cas. Self-Def., 2 Gr. Ev. 373.

Continuity. Condition once shown is presumed to continue until the contrary is shown. Carotti: 179; 1 Gr. Ev. 41, 42; Ford v. S. (1896), 73 Miss. 734, 35 L. R. A. 117-124, ext. n. Evidence of temperament and disposition and condition of mind of defendant inadmissible unless insanity is pleaded. Jacobs v. C., 121 Pa. 586, 6 Am. St. 802. R. v. Oxford; 1 Bish. C. L. 384, 387, 396, 758 (intent essential for a crime; sanity presumed).

Leading cases: U. S. v. Drew; C. v. Rogers; P. v. Rogers; S. v. Marler (burden of proof); *R. v. Oxford.*

Contract law; assent essential. Contract of insane persons. Molton v. Camroux: 413.

196. LOEFFNER v. S. (1857), 10 Ohio St. 598, 2 Crim. Def. 432; stated, Laws. Insan. Cas. Simp. 832; cited, 2 Crim. Def. 2 Gr. Ev. 373; McClain, C. L. *q.v.*

Loeffner stated: L. killed H. and his defense was insanity, which he failed to prove. He insisted the State must affirmatively prove his sanity, but the court laid down the law that all men are presumed sane until the contrary appears. So L. was found guilty and hanged. C. v. York.

Homicide; insanity. Burden of proof of sanity. C. v. Rogers; S. v. Marler; 2 Crim. Def. 533-768: cases; 2 Gr. Ev. 373.

197. C. v. YORK (1845), 9 Met. (Mass.) 93, 1 Lead. Crim. Cas. 322-362, ext. n., 43 Am. Dec. 373-396, n.; stated, 3 Gr. Ev. 14, 2 Crim. Def. 488; cited, 1 Wat. Tres. 281, 1 Gr. Ev. 34, n., 2 Crim. Def. 488, 489, 493, 497, 862, 3 Gr. Ev. 14, 1 Best, Ev. 393, 394, Kerr, Hom., 164 U. S. 497, 41 L. ed. 529; McClain, Crim. Law.

Cited, § 343, Hughes' Proc.; § 294, Gr. & Rud.

York stated: Y. killed Norton at night by stabbing him with a dirk through the heart. Great importance was attached by the defense upon the absence of proof as

Leading Cases.—197. York.

to malice, but Shaw, C. J. said: "A sane man, a voluntary agent, acting upon motives must be presumed to contemplate and intend the necessary, natural, direct and probable consequences of his acts." "Squib Case."

Sullivan v. S. (1893), 102 Ala. 135, 48 Am. St. 22, n.; 2 Bish. Cr. Proc. 303; Allen v. U. S., 164 U. S. 492 (41 L. ed. 492); Acers v. U. S., 164 U. S. 388 (41 L. ed. 481, ext. n.).

198. P. v. ROGERS (1858), 18 N Y. 9, 72 Am. Dec. 484-493, ext. n., Laws. Insan. Cas. 624, Beale, Crim. Cas. 61, 2 Crim. Def. 624; stated, 8 Ap. D. C. 20, 36 L. R. A. 484, Clark, Crim. Cas. 116; cited, Bish. C. L., 3 Gr. Ev. 6, 148; McClain, Crim. Law.

Cited, §§ 272, 294, Gr. & Rud.

Rogers stated: R. and two revelers became drunk, and meeting Swanston and wife "bumped" up against the latter and pushed her against her husband. High words followed. But they all passed on, when R. retraced his steps and overtook S. and wife and stabbed and killed him. R. then hurried home, and was helplessly drunk; and this was his defense, but it failed. One cannot make himself a demon and then have the defense of the insane. Drunkenness is itself a crime, and so aggravates. *Nullus commodum,* etc.; *Volenti,* etc.; Pirtle v. S.

Drunkenness; when a defense. U. S. v. Drew; Pirtle v. S.; C. v. Rogers; 3 Gr. Ev. 6. It is no defense. 3 Gr. Ev. 148.

Insanity as an element in criminal cases. C. v. Rogers; S. v. Marler; *Actus non facit.* 1 Bish. C. L. 374-396*a*; 3 Gr. Ev. 5.

Burden of proof; authorities are in conflict. It generally rests on the prosecution. S. v. Marler, n.; C. v. Rogers; C. v. Gerade, 145 Pa. 289, 27 Am. St. 689, n. (state must prove).

199. C. v. ROGERS (1844), 7 Met. (Mass.) 500, 1 Lead. Crim. Cas. (B. & H.) 94, 145, ext. n., 41 Am. Dec. 458. Redf. Am. C. Wills, 40, 2 Crim. Def. 158, Clark, Crim. Cas. 116; Trial of Abner Rogers; stated, 2 Gr. Ev. 372, 2 Crim. Def. 488, 18 L. R. A. 225; cited, 1 Bish. C. L., 1 Wh. Ev. 451, 3 Gr. Ev. 6, 2 Crim. Def., ext. n., *q.v.* Bish. Cr. Proc.

Rogers stated: R. a prisoner, while in a state of hallucination, killed the warden with a shoe knife. He was acquitted.

Homicide; insanity as a defense; delusion; medical testimony. McNaghten: 195; Loeffner; R. v. Oxford; 2 Gr. Ev. 338-340, n., 2 Bish. Cr. Proc. 684-687*b*.

Insanity as a defense to crime; McNaghten: 195.

Drunkenness; when a defense. U. S. v. Drew; P. v. Rogers, 3 Gr. Ev. 6, 2 Crim. Def. 533-768; Parsons v S., 81 Ala. 577, 60 Am. Rep. 193, Beale, Crim. Cas. 48, 60, n.: cases, Clark, Crim. Cas. 577 (McNaghten: 195); stated, 9 Crim. Law Mag. 812-828.

Burden of proof in insanity. 9 Am. Law

Leading Cases.—199. Rogers.

Reg. (N. S.) 201-210, 329-334, 2 Crim. Def. 432-532.

Irresistible impulse as an excuse. S. v. Harrison, 36 W. Va. 729, 18 L. R. A. 224-240, n.: cases.

200. R. v. OXFORD (1840), 9 C. & P. 525 (38 E. C. L. R.), 2 Crim. Def. 219, Clark, Crim. Cas. 150, 8 Rul. Cas. 42, 1 Bish. C. L., McClain, Crim. Law, 4 Mews' E. C. L. 1111, 1112.

Insanity as an excuse for crime. An insane person can commit no crime. Sanity is presumed until the contrary is shown. C. v. Rogers; McNaghten's; S. v. Marler; U. S. v. Drew.

Actus non facit reum nisi mens sit rea is the leading and basic maxim of the criminal law. It is much more prominent in Coke's Institutes: L. C. 187-200, *ante.*

201. WRIGHT v. TATHAM (1834), 1 Adol. & El. 3-23 (28 E. C. L. R.), 3 Nev. & M. 268, 11 Rul. Cas. 248, Thayer, Cas. Ev. 319, 40 R. R. 226, 6 Mews' E. C. L. 527.

Sub, nom: Tatham v. Wright (1830, 1831), 2 Russ. & M. 1, 5 Clark & Fin. 670, 4 Bing. 489, 6 Scott, 58, 2 Nev. & P. 305, 7 A. & E. 313, 39 Eng. Rep. 232.

Right to cross-examine a witness is a fundamental principle of protection, and it must be afforded as a condition to its admissibility. 1 Gr. Ev. 98, 445, n.; Kissam v. Forrest, 25 Wend. 651. Such principles springing from the common law are as scrupulously protected as if reaffirmed in constitutions. 2 Kent, 8, 12; Cruikshank. See *Nemo tenetur,* etc.

202. U. S. v. GOODING (1827), 12 Wheat. (U. S.) 460 (6 L. ed. 693), Thayer, Cas. Ev. 125, 631; 1 Gr. Ev. 233, 2 Best, Ev. 295, 346.

Cited, §§ 334, 341, Hughes' Proc.; §§ 294, 303, Gr. & Rud.

U. S. v. Gooding stated: G. was indicted for carrying on the slave trade in violation of the statute of 1818. He lived at Baltimore, where was fitted out his vessel and where he hired Hill, its master, who within the scope of the agency, admitted to Captain Coit the service and tried to hire him for a voyage to Africa and return to Cuba at $70 per month and $5 per head for each prime slave delivered in Cuba. H. told C. that G. would pay the crew. *Held,* that this testimony was competent against G. upon the principle of *Qui per alium,* etc. S. v. Ryan; Spies v. P.; P. v. Lawrence.

Kirkstall Co. v. Furness R. Co. The rules of evidence are the same in civil and criminal cases, except as to the burden of proof; and in treason and perjury. 1 Gr. Ev. 65, 233. Whatever an agent does in the scope of the agency is a part of the *res gestæ,* and therefore admissible. 1 Gr. Ev. 233; *Qui sentit,* etc.; Moore v. Bettis, 11 Humph. 67, 53 Am. Dec. 771-778 (*res gestæ* acts of agent bind principal within the scope of the agency. *Qui sentit,* etc.); Thallhimer v. Brinckerhoff,

Leading Cases.—202. Gooding.

4 Wend. 394, 21 Am. Dec. 155-158, Mech. Ag. 714-715 Sto. Ag.

Admission of agents. 2 Whart. Ev. 1170-1220: Mech. Ag. 714-715; 2 Cook, Stockh. 726.

Agents as witnesses. *Qui per alium,* etc. *Res inter alios acta;* Plymouth County Bank, 3 S. Dak. 170, 44 Am. St. 782, n.

Admissions admissible against one making them, or if made by his agent or one referred to, to make them. Gooding. Conduct and extra-judicial admissions. 1 Bish. Cr. Proc. 1247-1254; Clark, Cr. Proc. 211. Acts and declarations of officers. 1 Dill. Corp. 237, n.

Are competent to prove a deed or record. Queen's: 53*a;* Smith v. Palmer, 6 Cush. 513, Thayer Cas. Ev. 127; Slatterie v. Pooley, 6 Mees. & Wels. 664; Thayer, Cas. Ev. 752, 1 H. & W. 16; 11 Rul. Cas. 208. Or official character. C. v. Kane; 1 Gr. Ev. 96, 97. And while a conveyance must be by deed, still the conveyance may be proved by an admission. Smith.

Best evidence may be dispensed with by admissions. Smith v. Palmer: 1 Gr. Ev. 96, 97; Slatterie v. Pooley, *supra.* Notwithstanding the rule that requires the best evidence. Queen's Case; Bouchaud, *sub,* Bissell: 42 (admission by demurrer conclusive).

The rationale of an admission is that it is disserving—as against the interest of the one who made it,—and therefore it is presumably true. The presumption is that men are guardful and defensive of their interests; that self-defense is natural and is therefore acted upon; and this same principle runs through Higham: 213*c* (entries against interest). Notes, Bauerman: 48, 2 Sm. L. C., 8th ed.

Admissions, generally. 1 Gr. Ev. 27, 169-212, 1 Wh. Ev. 836, 841; 2 *id.* 1075-1220; 1 Tay. Ev. 653-688; 2 *id.* 506-510, 518-531; Brad. Ev. 103-118: Bauerman: 48; Pickard; Price: 213*f.*

Attorneys of record: admissions by. 1 Gr. Ev. 27, 186-204; 1 Tay. Ev. 700-709; Oscanyan: 41. Judicial admissions. 1 Gr. Ev. 205-227*a*; 1 Tay. Ev. 700-709, 760-765.

Accomplice; accessory; convicting upon testimony of. Stone v. S., 118 Ga. 705, 98 Am. St. 145-180.

Statutory crimes; how pleaded. U. S. v. Gooding; C. v. Bean: 226.

Agents; partners; conspirators—admissions of. 1 Gr. Ev. 171-189; 1 Tay. Ev. 712-713; 2 Wh. Ev. 1156, 1169-1220. Conspirators. Mercer v. S., 40 Fla. 216, 74 Am. St. 135; Spies v. P. See *Res Gestæ;* P. v. Vernon; *Res inter alios.*

Clothing agent with authority to do an act carries with it power to prove the agency. Consequently this may be proved by the agent himself. Moses, 24 N. H. 71, 55 Am. Dec. 222, n., Mech. Ag. 102; Thallhimer v. Brinckerhoff, 4 Wend. 394, 21

Leading Cases.—202. Gooding.

Am. Dec. 155-158, n., Mech. 714; Sto. 134, 135; Whart. Ag. 158; 1 Gr. 113; 2 Whart. Ev. 1170, 1173; Converse, 14 Mich. 109, 90 Am. Dec. 109, 1 Danl. Nego. Insts. 284.

Kirkstall Brewing Co. v. Furness, Gr. & Rud. 2 Whart. Ev. 1177, 1180; 3 Mews' E. C. L. 112; *id.* Huffc. Ag. 139. Admissions by agents. *Res Gestæ. Id.* 136-140.

203. ALLEN v. S. (1859), 28 Ga. 395, 73 Am. Dec. 760-777, ext. n. (rules stated; able *resume).*

Cited, §§ 181, 184, Hughes' Proc.; § 272, Gr. & Rud.

Impeachment of witnesses. See *Falsus in uno,* etc.; 1 Gr. Ev. 461-469.

204. HANLEY v. GANDY (1866), 28 Tex. 213, 91 Am. Dec. 315-320, n.

Handwriting; comparison of; proof by. 1 Gr. Ev. 576-581; 1 Wh. Ev. 705-722; Rogers, 12 Wall. 317 (20 L. ed. 417-419, n.); Dresler, 127 N. Y. 235, 12 L. R. A. 456-462, n. (expert and opinion evidence to prove); 2 Bish. Cr. Proc. 482, n. See Hickory: 94; University, 62 L. R. A. 817-874, ext. n. (conflicting cases in various jurisdictions), C. v. Kane: 183; Hickory.

Documents cannot be admitted to jury for them to compare. Fuller, 101 N. C. 119, 9 Am. St. 27, n. *Contra,* Gaunt, 53 Kan. 405, 42 Am. St. 297, n.: cases.

Limitations of evidence to handwriting. S. v. Ryno (1904),—Kan.—, 64 L. R. 303-320, ext. n.

205. KING v. OREGON SHORT LINE R. R. (1898),—Idaho,—59 L. R. A. 209-277, ext. n., 55 P. 665.

Cited, §§ 169, 296, Gr. & Rud.

General allegations in cases of negligence; when sufficient. A general allegation of negligence is not objectionable to a general demurrer. It is aided by waiver—pleading over. Dobson. *Cf.* L. & N. R. R., 125 Ala. 237, 50 L. R. A. 620; Farnam: 97.

The statement must be in ordinary and concise language and without unnecessary repetition, is the language of the code. King; Sturges: 111.

Fact showing negligence must be pleaded. Holland, 120 Ind. 146, 16 Am. St. 307; L. & N. R. R., *supra;* Labatt, Mas. & Ser. 850-867.

The facts must be pleaded. Specific allegations of negligence need not appear. Cincinnati R. R., 30 Ind. App. 663, 96 Am. St. 355.

To prove negligence a town ordinance may be introduced and proved without pleading it; as where a train was running faster within a town than was permitted. Faber, 29 Minn. 465.

Prolixity is to be avoided. C. v. Kane.

Negligence; what are sufficient facts. Gibson, 1 Alas. 407 (personal injury; the relative position of the vessel and the wharf; averring the defective appliances used and the defects therein; also the acts constituting the negligence).

Leading Cases.—

206. McCULLY v. CLARK (1861), 40 Pa. 399, 80 Am. Dec. 584, n., Bigl. L. C. Torts, 559-601, ext. n.; 1 Wh. Ev. 359, Wh. Neg. 42-321.

The burden of proof is upon the plaintiff to allege and prove negligence; the law will not presume it. McCully; 1 Wh. Ev. 359; Losee: 210. *Ei incumbit,* etc.; Labatt, Mas. & Ser., 817-843.

One alleging negligence must prove it notwithstanding plea of contributive negligence. Looney v. R. R. 200 U. S. 480. See Dickson: 34. A charge of gross negligence must be proved as laid; proof of ordinary will not do. Rideout.

Negligence; a question of law or fact. Kearney; *De non apparentibus,* etc.; *Actore non probante reus absolvitur.*

207. STOKES v. SALTONSTALL (1839), 13 Pet. (U. S.) 181 (10 L. ed. 115, n.); Saltonstall v. Stockton; Taney 11, Fed. Cas. No. 12271: cases (approved, Gleeson, 140 U. S. 435); 7 Am. Neg. Cas. 297; stated, Bigl. L. C. Torts, 599; cited, Hutch. Carr., Ror. R. R., Shear. & Redf. Neg. 28, 280, Whart., Chit. Conts., Cool. Torts, Jag. Torts, Bigl. L. C. Torts, 599, 723, 2 Gr. Ev. 221, 2 Kent, 601, 23 Or. 215, 27 L. R. A. 280, Busw. Pers. Inj. 111, 113, Suth. Dam. § 348.

Carriers of passengers are not insurers, but are bound to the highest degree of care. Stokes; Christie, 2 Camp. (Eng.) 79; stated, Hutch. Carr. 500; Ingalls: 353; Budd, 25 Or. 314, 27 L. R. A. 279-284, n.; Patton, 179 U. S. 658; Whitney: 112.

Contributory negligence of a passenger bars a recovery. Volenti; Suth. Dam. 39.

Servant's contributory negligence bars a recovery for personal injuries inflicted in the master's service. *Sub,* Farwell v. R. R.

Evidence of negligence. If a carriage is upset it is prima facie evidence of negligence. Res ipsa loquitur; Ror. R. R. p. 1434; Kearney; Pa. R. R. 124 Pa. 462, 10 Am. St. 601, 2 L. R. A. 820, citing Stokes: cases, 25 Or. 320, 27 L. R. A. 283; Treadwell, 80 Cal. 589, 5 L. R. A. 498: Sto. Bail. 592-601: cases; Spellman, 36 Neb. 890, 20 L. R. A. 316; ext. n.; 179 U. S. 663.

Presumptions of negligence from happening of accident. Chicago R. R. 163 Ill. 477, 54 Am. St. 478, n.; *Res ipsa loquitur;* Kearney, Story, Bailm. 592-601: cases. Johnson, 89 Minn. 310, 99 Am. St. 571 (innkeeper *prima facie* liable if goods of guest are lost).

Derailment of a coach is prima facie evidence of negligence. Res ipsa loquitur; Kearney; Stokes; 1 Add. Torts, 546; Pa. R. R., *supra.*

Passenger acting to escape peril to which the carrier has exposed him, is not guilty of contributory negligence. Stokes; Hutch. Carr. 662, *sub, Volenti.* Nor when put suddenly to election by the negligence of the carrier. Stokes; *Volenti,* etc.

208. HAMMACK v. WHITE (1862), 11 Com. B. N. S. 588, 103 E. C. L., Bigl. L. C. Torts, 570-601, n., Ball, Torts, 211;

Leading Cases.—208. Hammack.

stated, Bigl. L. C. Torts, 594, 18 Rul. Cas. 705, 1 Add. Torts, 544; cited, Cool., Bish. Add. Torts, 33, Bro. Max, 393, Shear., Whart., Bigl. L. C. Torts, 582, Week, Dam. Abs. 118, 128, 1 Wh. Ev. 359, Buswell, Pers. Inj. 111, 10 Mews' E. C. L.

The mere happening of an accident is not sufficient evidence of negligence to be left to a jury; but the plaintiff, must give some affirmative evidence of negligence on the part of the defendant. Hammack.

Negligence. Trying a horse in a public thoroughfare is not negligence *per se.* Hammack; Brown v. Collins "Squib case."

Burden of proof is upon plaintiff. Some evidence of want of skill, or carelessness must appear to warrant submission to jury. Hammack; Toomey, 3 C. B. (N. S.) 146; Kearney; Moak Torts, 309.

209. BYRNE v. BOADLE (1862), 2 Hurl. & C. 722, Bigl. L. C. Torts, 578-601, n., Ball, Torts, 219; stated, 107 Cal. 549, 48 Am. St. 151, 29 L. R. A. 718, 80 Md. 149, 45 Am. St. 333, 27 L. R. A. 156, 18 Rul. Cas. 706; cited, Cool. 799, Moak, 313, 1 Add. 228-234, 240, 584, 1 Wh. Ev. 357, 2 Best, Ev. 321, Busw. Pers. Inj. 111*a*, 10 Mews' E. C. L.—*Prima facie* evidence of.

Byrne stated: Negligence, presumption of: *Res ipsa loquitur.* A barrel of flour fell upon plaintiff from defendant's window above and injured him. *Held, prima facie* evidence of negligence, and cast the *onus* of proving want of negligence upon defendant. Kearney; Stokes; Judson, 107 Cal. 549, 48 Am. St. 146, n.: cases, 29 L. R. A. 718: *Res ipsa loquitur;* Labatt, Mas. & Ser. 834.

Burden of proof on defendant. Labatt, Mas. & Ser. 832; *Ei incumbit,* etc. Judicial notice. Labatt, Mas. & Ser. 831; *De non apparentibus,* etc.

Negligence is not inferable from the mere occurrence of an accident. Labatt, Mas. & Ser. 833.

210. LOSEE v. BUCHANAN (1873), 54 N. Y. 476, 1 Thomp. Neg. 47-115, ext. n., 10 Am. Rep. 623, Pattee, Torts, 143, Erwin, Torts, 705, 94 Tex. 159, Cool. Torts, *q.v.;* Frost, 42 S. C. 402, 46 Am. St. 736, n., 26 L. R. A. 693; Judson, 107 Cal. 549, 48 Am. St. 146, n., 29 L. R. A. 718, 36 Am. St. 814; Cool., Bish., Bigl. Lead. Cas. Torts, 2 Gr. Ev. 469; Gilson v. Delaware Canal Co. Cited, §§ 347, 348, Hughes' Proc.

Explosions; boilers; powder. Lawful business and accident occurring, non-actionable. Salisbury. *Sic utere tuo,* etc.

Directors of a corporation liable for its torts, when, Losee. See JOINT TRESPASSERS; ELECTION OF REMEDIES. Liability for accidents. 2 Cook, Corp. 682; *id.* 908; Sullivan, 161 N. Y. 290; Erwin, Torts, 486 (sating Hay and Losee cases). 19 Cyc. 4.

211. KEARNEY v. LONDON R. R. (1870), L. R. 5 Q. B. 411, 6 Q. B. 759, 1 Thomp. Neg. 1220-1309, Bigl. L. C. Torts: cases, Mews' E. C. L.; Torts, 230.

Cited, §§ 103, 315, Hughes' Proc.

Cited, §§ 271, 296, Gr. & Rud.

Res ipsa loquitur; brick falling from bridge.

Leading Cases.—211. Kearney.

A passenger on a highway, which ran under a railway crossing, was struck by a brick which fell from a perpendicular pier belonging to the railway company and injured the passenger. He at the time heard a noise as of a train passing above. *Held,* a *prima facie* case of negligence. Stearns, 184 Pa. 519, 39 L. R. A. 842, n., Busw. Pers. Inj. 111*a*; Griffin, 166 N. Y. 188, 82 Am. St. 630, n. (inference of negligence). 113 Am St. 980-1031 ext. n. (presumption from accident). *Probatis extremis,* etc.; *Ex uno disces omnes; Facta sunt potentiora verbis; Res ascendit,* etc. Acts speak as plainly as words. See WAIVER. Fraud must appear from all the facts. 2 Chit. Conts. 1039. From the facts, relations and conditions, fraud is judged. Farnam: 97.

Presumption of negligence. 1 Bailey, Pers. Inj. 1597-1793; Kinkead, Torts; Busw. Pers. Inj.; Calye's Case; Labatt, Mas. & Serv. 816-848. Conjecture: Robinson:—N. C.—6 L. R. A. N. S. 337-365. 2 Bailey, Pers. Inj. 1672. See *Res ipsa loquitur.*

Res ipsa loquitur: the thing speaks for itself. Gleeson v. R. R., sub, Stokes. Whart. Neg. 842; 1 Add. Torts, 33, 586; Rattan v. R. R. (1906), Mo. Ap.: cases. Waller: *sub,* Salisbury (injury from awning in street). 113 Am. St. 980-1031. 6 Am. St. 793; 80 Md. 149; 45 Am. St. 334; 107 Cal. 557; 48 Am. St. 151; 18 Rul. Cas. 707; Moak, Torts, 814; Shear. Neg. 448; 2 Dill. Corp. 1011; 2 Best, Ev. 320; Volkmar, 134 N. Y. 418, 30 Am. St. 678, n.; Busw. Pers. Inj. 189; The Douglas (1882), 7 P. D. 151-161, 18 Rul. Cas. 695, n.; Mews' E. C. L.; Baltimore R. R. v. S., 75 Md. 152, 32 Am. St. 372, Thyng, 156 Mass. 13, 32 Am. St. 425, n.; Long v. Pa. R. R. (1892), 147 Pa. 343, 30 Am. St. 732, 14 L. R. A. 741 (baggage lost in the Conemaugh dam disaster, which swept away all things in the valley, including Johnstown, speaks for itself; *Actus Dei,* etc.) (bursting boiler); Huey, 121 Pa. 238, 6 Am. St. 790, ext. n. (dangerous premises injuring one thereon; presumptions from; duties of owners). Indemaur; Heaven; Howser, 80 Md. 146, 45 Am. St. 332, 27 L. R. A. 154; Uggla, 160 Mass. 351, 39 Am. St. 481, n.; Spellman, 36 Neb. 890, 38 Am. St. 753; Judson, *supra* (explosion raises presumption of negligence); Hart, 157 Ill. 9, 48 Am. St. 298, 29 L. R. A. 492; Hawkins, 3 Wash. 592, 16 L. R. A. 808; Hendrickson, 49 Minn. 245, 16 L. R. A. 261-267, ext. n. (presumption when one is found dead); Haynes, 114 N. C. 203, 19 S. E. 344, 41 Am. St. 786, n., 26 L. R. A. 810; 3 Cook, Corp. 937*b*; stated and approved: Denver Co., 21 Colo. 371, 31 L. R. A. 566-593, ext. n.: cases (electric wires in streets); "Squib Case."

Prima facie evidence means sufficient evidence upon a fact to submit it to a jury —more than a scintilla is evidence sufficient to ground a stronger belief than mere suspicion or conjecture. Citizens' Ry.: 186. *Prima facie* evidence was introduced in Piper v. Pearson. *Prima facie* evidence is sufficient evidence to send a case to a jury, unless the evidence to the contrary is overwhelming. Simply contradicting a *prima facie* case with one witness is no ground for withdrawing a case from a jury. *Contra:* Pullman Co. v. Freudenstein (1893), 3 Colo. Ap. 540 (a most exceptional case denying the general rule).

Hirer of a horse, receiving it in sound condition but returning it injured, must be proven negligent; negligence is not presumed. Maloney, 60 Vt. 471, 6 Am. St. 135. This case should not apply where hirer admittedly continued to use a horse after the fact appeared that its further use would greatly damage or ruin it. 2 Kent, 587, n.

Sufficient evidence of negligence or motive. Dant v. S.; Cotton, *sub,* LAW OF THE ROAD: Green, 109 N. Y. 297, 4 Am. St. 450; *Cf.* Kearney; Jones, Neg. Corp.; 2 Kent, 588 (Warehousemen). See *Probatis,* etc.; *Res ipsa loquitur.* See MALICE.

212. DANT v. S. (1882), 83 Ind. 60, 3 Crim. Law Mag. 816-826, ext. n.

Cited, § 294, Gr. & Rud.

Dant stated: Indictments; circumstantial evidence. Sale of intoxicating liquor on the Sabbath is sufficiently proved from the circumstance that the door of the saloon was open, and that witnesses on the sidewalk saw the defendant delivering customers something the color of whisky, out of a small glass about the size of a whisky glass, and the delivery of coin, and the return of change; the venue being also proven. *Res ipsa loquitur;* Hickory: 194; Citizens' Ry.: 186.

Arson; conviction upon circumstantial evidence; what sufficient. S. v. Halleck, 65 Wis. 147, 7 Crim. Law Mag. 643, 1 Bish. Crim. Proc. 1125, 2 *id.* 53.

Instructive cases on: Peltner's, 4 Crim. Law Mag. 157-171 (interesting history of the case); 1 Wigm. Ev. 219-429.

213. DIDSBURY v. THOMAS, 2 Sm. L. C. 353-364, 11th ed. See HEARSAY EVIDENCE.

213a. STRONG v. S. (1882), 86 Ind. 208, 44 Am. Rep. 292-308, n.; 1 Bish. Cr. Proc. 1127; S. v. Kelly, 65 Vt. 531, 36 Am. St. 884, n.; C. v. Jackson, 132 Mass. 16, 44 Am. Rep. 299, n.; Mallory v. S., 37 Tex. Cr. Rep. 482, 66 Am. St. 808, n. (forgery); P. v. Molineux.

Cited, §§ 334, 336, Hughes' Proc.; § 278, Gr. & Rud.

Evidence; intent; collateral facts; when they may be shown to prove intent. Strong. See *Actus non facit reum,* etc.; *Res inter alios acta,* etc.; R. v. Wylie; R. v. Ellis; Bristow: 135.

System; is admissible to prove intent. Res inter alios acta, etc.; R. v. Francis; R. v. Carter; 1 Wh. Ev. 20-46; Sykes v. S.

Leading Cases.—213a. Strong.

112 Tenn. 572, 105 Am. St. 972-1006 ext. n.; 12 Cyc. 406-412, 16 Cyc. 1155; 21 Cyc. 916; P. v. Molineux, 168 N. Y. 264, 62 L. R. A. 193-357, ext. n.; S. v. La Page, 57 N. H. 245, 1 Am. Crim. R. 506-582; Defrese v. S.

Collateral facts; are often admissible to prove the principal fact in issue. Strong; R. v. Wylie; R. v. Ellis; *Res inter alios,* etc.; Moore v. U. S., 150 U. S. 57; R. v. Francis; 1 Bish. Cr. Proc. 1120-1129; 2 *id.* 8 (arson).

Presumption from the commission of another crime. 1 Bish. Cr. Proc. 1220-1229. Facts necessary to explain or introduce relevant facts. Clark, Crim. Proc. 195. Motive; any fact that shows a motive to commit the crime charged, is admissible. Clark, Crim. Proc. 196. Recent possession of fruits of crime. R. v. Partridge: 190. Abortion, cards and circulars of accused are admissible. C. v. Barrows (1900), 176 Mass. 17, 79 Am. St. 296.

Assault and battery; previous altercations. Hannabalson, 116 Iowa, 457, 93 Am. St. 250.

213b. R. v. ELLIS (1826), 9 Dowl. & Ry. 174, 6 Barn. & Cress. 145 (13 E. C. L. R.), 2 Lead. Crim. Cas. (B. & H.) 18-25; 11 Rul. Cas. 237.

One transaction may include distinct acts or takings, and be separated by intervals of time (R. v. Ellis), *e. g.,* the stealing of gas and consuming it. R. v. Firth (1869), Law Rep. 1 C. C. 177; stated, note, R. v. Ellis, B. & H. Lead. Crim. Cas.; cited, 2 Bish. C. L. 798; 7 Crim. Law Mag. 711-723; R. v. Partridge (possession of stolen goods); *Res ipsa.*

Splitting crimes, not permissible. 2 Van Fleet, For. Adj. 595-628; 7 Crim. Law Mag. 714-715; Bendernagle; notes, 58 Am. Dec. 539; S. v. Warren (1893), 77 Md. 121, 39 Am. St. 401, n.; S. v. Emery (1895), 68 Vt. 109, 54 Am. St. 878, n. See *Res Adjudicata.*

Several felonies parts of one transaction; one as evidence to show the character of another. "The evidence must correspond with the allegations and be confined to the point in issue," has exceptions in counterfeiting, poisoning cases, etc. Strong; R. v. Wylie; *Res inter alios.* See SYSTEM; 1 Whart. Ev. 20-45; P. v. Molineux.

R. v. Whiley or Wylie (1804), 2 Leach, 983, 2 Ld. Crim. Cas. (B. & H.) 26-34; R. v. Holt (1860), 11, 8 Cox, C. C. 411; 11 Rul. Cas. 237; 2 Best, Ev. 297, 1 Bish. Cr. Proc. 1126, 2 *id.* 261. Admissibility of separate offenses to prove intention—system. *Ex uno disces omnes.* 1 Whart. Ev. 20-45; Strong: 213*a*.

Possession of stolen goods; presumptions from. R. v. Partridge; *Res ipsa loquitur.*

213c. HIGHAM v. RIDGWAY (1808), 10 East, 2 Sm. L. C. 361-365, 8th ed.; 327-352, 11th ed.; Thayer, Cas. Ev. 557, 11 Rul. Cas. 266-281, n., 10 R. R. 109, Mews' E. C. L.; Nicholls v. Webb (1823), 8 Wheat. (U. S.) 326 (5 L. ed. 628); cited, *sub,* Price: 213*f*, 1 Gr. Ev. 116, 147,

Leading Cases.—213c. Higham.

149-151, 1 Whart. Ev. 226, 229, 239, 1 Tay. Ev.; 1 Best, Ev. 117, 2 *id.* 500; Bro. Max. 961.

Cited, §§ 112, 334, 341, Hughes' Proc.

Higham stated: In the settlement of an estate it became material to prove the date of birth of William Fowden. To prove this, a man-midwife's entry in his books, other dates and occurrences in the ordinary course of business, accompanied by another entry in his ledger of the charge for the service, and a *memorandum of payment* at a later date were admissible.

Entries and declarations against interest. Higham; Middleton, 10 B. & C. 317 (21 E. C. L. R.), Thayer Cas. Ev. 562, stating Higham; Davies, 6 M. & W. 153, Thayer, Cas. Ev. 567, stating Higham; R. v. Parish of Birmingham, 1 B. & S. 763, 101 E. C. L. R., Thayer, Cas. Ev. 568, stating Higham; Smith, L. R. 2 Q. B. 326, Thayer, Cas Ev. 570, stating Higham; Taylor, 3 Ch. Div. 605, Thayer Cas. Ev. 575 (entry against interest); Mahaska; 1 Gr. Ev. 147-155; Dennis, 19 Ala. 29, 54 Am. Dec. 186 (principal's declarations bind surety only when part of the *res gestæ*). Declarations of an officer that he was removed when the bond sued on was executed, is admissible against his heirs and executor, where (1) the declarant is dead; (2) where the declaration is against interest; (3) of a fact personally cognizable. Mahaska County Case; Brain, 11 M. & W. 773; Gilchrist, 1 Bailey, Eq. (S. C.) 492, Ell. Ev. 476-494. See DECLARATIONS AGAINST INTEREST.

213d. COUNTY OF MAHASKA v. INGALLS (an excellent case, stating Nicholls v. Webb and Higham), 16 Iowa, 81; Thayer, Ev. 580-588; cases; Dill. Corp., Beach, 2 Wh. Ev. 1212; Framingham Mfg. Co., 2 Pick. (Mass.) 532, Thayer, Cas. Ev. 578; Berry, 4 T. R. (D. & E.) 514; stated, 2 Pick. 532 (entries against interest).

Mahaska stated: If a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death. Higham; 11 Rul. Cas. 266; Bro. Max. 961.

Evidence; admissions. Declarations and entries of deceased persons contrary to interest are admissible in evidence. *Res inter alios acta,* etc.; Price: 213*f*; Mahaska (declarations against interest). Halverson, 87 Minn. 18, 94 Am. St. 669-683, ext. n. (testimony of absent, dead or subsequently disqualified witnesses).

213e. DRAYTON v. WELLS (1819), 1 N. & M. (S. C.) 409, 9 Am. Dec. 718; Thayer, Cas. Ev. 337, 1 Gr. Ev. 163, 1 Phil. Ev. 179, 394-396, 2 *id.* 172; R. v. Scaife (absent witness), 1 Tay. Ev. 440.

The testimony of a witness subsequently dead, absent or disqualified may be proved in four cases: 1. Where the witness is dead (Wright v. Tatham); 2. Where insane; 3. Where beyond the seas (Magill),

Leading Cases.—213e. Drayton.

4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713, n. *Contra:* Bergen v. P. 17 Ill. 426; 65 Am. Dec. 672-679, n. Shorthand report of, admissible to prove. Omaha, 35 Neb. 68, 37 Am. St. 432, n.; 4. When kept away by the opposite party. Drayton; R. v. Scaife; *Nullus commodum capere,* etc.

The rule applies to civil and criminal cases alike. U. S. v. Macomb, 5 McLean, 286, *contra* cases; Thayer Cas. Ev. 339; C. v. Richards, 18 Pick. 434; R. v. Joliffe, 4 Term Rep. (D. & E.) 285; Ruch, 97 U. S. 693, Mattox, 156 U. S. 237.

Testimony of witnesses subsequently dead, absent or disqualified. Drayton; Magill, *supra;* 1 Gr. Ev. 163-168; 1 Tay. Ev. 433-447; 1 Rice, Ev. 496; 1 Phil. Ev. 389-401; 1 Wh. Ev. 177-180; Wh. Cr. Ev. 227-231; 1 Bish. Cr. Proc. 1099; Bergen v. P., *supra;* Davis, 96 Mo. 401, 2 L. R. A. 78, n.; 1 Bish. Cr. Proc. 1194-1206; Clark, Cr. Proc. 215; 94 Am. St. 669-683. Admissibility of, an exception to the rule rejecting hearsay. *Res inter alios,* etc.

213f. PRICE v. TORRINGTON (Earl of) (1704), 1 Salk. 285, 1 Lord Raym. 873; Thayer, Cas. Ev. 473, 1 Sm. L. C. 563-614, n.; 1 Gr. Ev. 110, 116; Welsh, 15 Mass. 380, Thayer, Cas. Ev. 481, 1 Wh. Ev. 238, 242, 726; 2 Danl. Nego. Insts. 1057, 2 Pars. N. & B. 495, Bro. Max. 964, Tay. Ev.; Merrill, 16 Wend. 586, 30 Am. Dec. 130, 2 Best, Ev. 501.

Cited, §§ 112, 334, 341, Hughes' Proc.

Cited, § 272, Gr. & Rud.

Evidence; admissions; books of account, entries in. Declarations of deceased persons in the course of business admissible in evidence. Price; Higham; *Res inter alios acta,* etc.; S. v. Bacon; 1 Gr. Ev. 114-120; Lassone, 66 N. H. 345, 17 L. R. A. 525: stated, Price; Union Bank, 3 Pick. 96, 15 Am. Dec. 181-198, ext. n.; House, 141 Ill. 290, 33 Am. St. 307, n.; Nicholls, 8 Wheat. 326, Thayer, Cas. Ev. 485, stating Pritt, 3 Camp. (Eng.) 305, Thayer, Cas. Ev. 480, also Higham; Moore, 165 Pa. 294, 44 Am. St. 664; Smith, 163 N. Y. 168, 52 L. R. A. 545-610, ext. n. (books of account in one's own favor). See BOOKS: And. Dic., Bouv. Dic.; Ell. Ev. 454-475.

Books of account. 1. The only books which can be introduced are books of original entry. This does not necessarily mean the memorandum book in which certain data have been set down as a basis for charge, but it means the book in which the actual charges have been made. For instance, it has been held, where it appeared that a certain book had been used as a memorandum book, from which an entry of charges against parties in what was called the "sales book" was made, the sales book was the book receivable in evidence as the book of original entry, and not the memorandum book; and where it appeared that the ledger was the parties' book of original entries, that book has been admitted as evidence. *Rationale.* 1 Gr. Ev. 438; S. v. Bacon. Book must contain entries with more persons than the one against whom it is offered in evidence. Fulton, 178 Pa. 78, 35 L. R. A. 133, n.

Leading Cases.—213f. Price.

2. *The books must be verified by the oath of the party who made the entries.* Bates, 151 U. S. 149, or a sufficient reason must be given why such verification is not made. If, however, the clerk or party who made the entry is dead (Merrill), or, for any other reason, cannot be produced, the books may, upon proof of their genuineness of the evident right of the party who made the entries to make them, and that it was his duty to make them, be received as evidence: and in the absence of evidence to the contrary, will be sufficient to establish a *prima facie* case. 1 Gr. Ev. 115.

3. *The books must show a continuous dealing with persons generally,* or several items of charge, at different times, against the other party in the same book, or set of books. A mere occasional entry made by a party as a memorandum of a transaction will not be admissible. It would be too easy for a litigant to make such an entry long after the transaction, and give it a weight with the jury far beyond its real worth. The entries which are offered must appear to be a part of the series of transactions, and must have been made in regular order with other transactions of the same date. The books must be regularly kept; loose and unverified memoranda will not do. Bates v. Preble, *supra.* Nor can a witness refresh his memory from anything but original memoranda. S. v. Bacon; Cluett, 100 Mich. 193, 43 Am. St. 446, n. (fair on face and in ordinary and usual way); Higham. A shingle, upon which an account is kept by a woodman, is admissible. Kendall, 14 Me. 30, 30 Am. Dec. 728.

4. *The entries must have been made at the time of the transaction.* The probabilities are that there was then no motive to falsify. After the lawsuit has begun, entries made by either party are made under the strongest motive to misrepresent, and are worthless. 1 Gr. Ev. 115, 116, 437, 438; S. v. Bacon. They must be contemporaneous; but objection upon this may be waived. R. R., 60 Ark. 333, 46 Am. St. 202; Burley, 111 U. S. 216. Must be original data, and not copied from other. Harmon, 41 Or. 587, 93 Am. St. 748, n., important rules.

5. *The entries must have been made in the ordinary course of business.* Higham; that is, a dry goods dealer could not prove by his books the charge made for the sale of a horse and wagon; neither could he show a charge made for a sum of money loaned, because he is not in the business of loaning money or dealing in horses. Some courts, however, will receive books as evidence of loans of money where the sums are small, say not more than five or ten dollars. Note, 46 Am. St. 208.

6. *If the entries are made by a clerk it must have been a part of his duties to make such entries;* and if the entry is made by a clerk who ordinarily had nothing to do with the books, it is probable that such an entry would not be admissible. Price; 1 Gr. Ev. 116, 117.

7. *The entries made must have been within the ordinary scope of the employment of the party making them.* A memorandum voluntarily made by the book-

Leading Cases.—213f. Price.

keeper of the same transaction, outside of the line of his work, is not admissible. Security, 85 Iowa, 543, 39 Am. St. 311, n.; 1 Gr. Ev. 117; 96 Am. St. 208.

8. *The entry must have been made by some one who knew the facts recited therein, or at least whose duty it was to know them.* Price.

9. *There must have been no more motive to falsify that particular transaction than any other transaction entered at the time.*

Are admissible from necessity. Fireman's Co. v. R. R., 138 N. C. 42, 107 Am. St. 517-526. §§ 46, 50, Gr. & Rud.

Memorandum to refresh memory; important rule. S. v. Bacon; 1 Gr. Ev. 437, 438.

213g. C. v. GANNETT (1861), 1 Allen (Mass.), 7, 79 Am. Dec. 602, n.; 2 Bish. Cr. Proc. 2, 112, 116.

Gannett stated: Evidence that there was no noise nor disturbance of the peace in a house or among the neighborhood immaterial and properly excluded on an indictment for keeping a house of ill-fame. Gannett. Indictment for keeping house of ill-fame will lie, though defendant merely aided and assisted others in keeping the same. R. v. Almon; R. v. Michael; Hipp v. S.

Hearsay; general reputation; disorderly house. Evidence of general bad character for chastity of females who frequent house, is competent to show that the house is of bad repute on indictment for keeping a house of ill-fame. Gannett; O'Brien, 28 Mich. 212, 2 Crim. Law Rep. (Green) 571; cited, 1 Bish. C. L. 1088; Beard v. S., 71 Md. 275, 4 L. R. A. 675, n.; S. v. Thomas: 257. *Contra,* Kenyon v. P., 26 N. Y. 203, 84 Am. Dec. 177, n.

In misdemeanors, all who participate in a criminal act are deemed to be principals. Gannett; R. v. Manning; R. v. Stevens; C. v. Brown, 147 Mass. 585, 13 L. R. A. 195, n. (aiders and abettors of crime are all principals).

Conversation of men held outside of alleged house of ill-fame, and immediately after coming out of it, but not in the presence of the defendant or any of the inmates, concerning what had taken place in the houee, is not admissible on the trial of an indictment for keeping a house of ill-fame. C. v. Harwood, 4 Gray, 41, 64 Am. Dec. 50, n.; *Res inter alios,* etc.

Accused must be shown to be the keeper; general reputation insufficient. But this may be proved by his acts and conduct. *Res ipsa loquitur;* S. v. Hand, 7 Iowa, 411, 71 Am. Dec. 453, n. General reputation may be ordained sufficient by statute. S. v. Thomas.

Impeachment of witnesses. Here the general reputation of the witness for veracity is singularly sought, yet it is a proper question to ask the witness what degrees of credit he gives the testimony involved. *Falsus in uno.*

Rape. Prosecutrix's answers to collateral questions are conclusive. Here, general reputation for chastity is immaterial, yet it is held her general reputation for indecency may be inquired after to affect her testimony. *Sub,* R. v. Riley, *post.* This widens the field founded on the reasoning, that one may be perfectly upright

Leading Cases.—213g. Gannett.

in one department of life and abandoned in others.

Disorderly, bawdy and tippling house may be proven such by general reputation. This rests on the reason, that one will defend attacks upon his habitat, house, or place of business. Inculpatory circumstances that surround such places are easily overcome, explained or prevented, if erroneously comprehended. Some things must be proved by system (*Res inter alios,* etc.), or by circumstances, as adultery. *Res ipsa loquitur.*

One who permits a chain of circumstances to arise and remain around him, from which irrefragable inferences are made, should not complain of the ordinary, natural, direct and probable effects of his own conduct or acts.

Volenti non fit injuria. From this standpoint, defamation suits should be favored; that one should defend his character as he would his person or property. "A speedy remedy shall be afforded for every injury of life, property, liberty or character," is a common guarantee. Every good citizen must stand for *Salus populi suprema lex,* truth and justice. Conspiracies against these often exist, but they invite, and sooner or later are overtaken with just retribution. Conspiracies only deny good reputation to the citizen. Respectability is boundless and should be given all who live respectably, and courts should protect it, otherwise guaranties for its protection should be omitted from great charters.

213h. R. v. RILEY (1887), 18 Q. B. D. 481, 16 Cox, C. C. 191, Chaplin, Crim. Cas. 279.

Rape; character of prosecutrix; relevancy of evidence; collateral facts. Relation of prosecutrix and accused is relevant, but not her relations with third persons. *Res inter alios acta,* etc. And if these are inquired after, her answers are conclusive—they cannot be contradicted. 1 Gr. Ev. 448-450. *Held,* general indecency of prosecutrix may be sworn. R. v. Tissington, 1 Cox, C. C. 48. And this may then be rebutted. *Res inter alios acta,* etc.; Rice v. S., 35 Fla. 326, 48 Am. St. 245, n.

Collateral facts; if inquired after, the answers thereto are conclusive upon the interrogator. 1 Gr. Ev. 448-450. This rule is important.

214. TRIST v. CHILD (1874), 21 Wall. (U. S.) 441-453, 2 L. ed. Co. 623, Williston, Conts. 210, Huff. & W. Conts, 340, Mech. Ag. 21, Pub. Off. 360, Huff. Ag. 27 (legality of objects), 83 (compensation; illegal services); Tiff.; Greenh. Pub. Pol. 359, Cool. Const. Lim. 165. See citations, Mech. Ag., Pub. Off. Throop, Pub. Off., Ans., Pars., Bish., Chit., Beach, Conts.; Cool. Const. Lim., 2 Pom. Eq., 3 Gr. Ev. 71; Clippinger, 5 Watts & Serg. 315, 40 Am. Dec. 519-523, 1 Sto. Eq. Pl. 293*a;* Basket, 115 N. C. 448, 44 Am. St. 463, n., Hazleton v. Sheckells. §§ 7, 20, 88, 133, 134, Hughes' Conts.

Cited, pp. 13, 33; §§ 1, 4, 5, 5*b,* 7, 13, 14, 18, 20, 21, 50, 52, 76, 126, 145, 149, 156, 158, 182, 204, 299, Hughes' Proc.; §§ 1, 46, 77, 80, 100, 123, 137, 139, 151, 163, 262, 284, 292, Gr. & Rud.

Leading Cases.—214. Trist.

Trist stated: Trist had a claim against the United States and engaged Child to "lobby" it through congress for twenty-five per cent., in the sense in which the word "lobby" is used. *Held,* the contract was void. This case well illustrates illegal contracts, and the opinion, with great force and eloquence, points out the necessity of government to exact loyal devotion from its citizens and officers.

In pari delicto contracts of lobbyist and secret agents. These are void for reasons of public policy; for they undermine the morals of the people and corrupt government. If such influences and contracts are not repressed; this is a warning:

"A compact corps of venal solicitors, vending their secret influences, will invest the capital of the Union and of every state until corruption shall become the normal condition of the body politic, and it will be said of us as of Rome,—'*Omne Romæ venale!*'"

Marshall v. B. & O. R. R. (1853), 16 How. 314; Pars. Conts. ed., Bish. 499, 502; Reinh. Ag. 11; Houlton, 60 Minn. 26, 30 L. R. A. 737, ext. n.; Tool Co.; Oscanyan: 41.

From the Marshall case we quote:

"The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history."

Mont. Spir. Laws. Washington's farewell Address: vol. 8, World's Orators; Judah P. Benjamin: 10 *id.* p. 97 (virtue the corner-stone of republican government).

The rationale of construction is for protection, education and moral advancement. Upon these depend the usefulness and stability of government. Borden; Windsor; Oakley. Wager contracts are construed from this policy. See CONTRACTS; CHRISTIANITY.

Construction is for the perpetuity of government. Brooks: 370; Murray: 319; Whitworth, 2 Chit. Conts. 971-1022; Church v. U. S.

Constitutions yield to fundamental law. Oakley: 222. "Parliament is omnipotent," (Thorp Case), but its ordinances are restrained by fundamental law. Stockdale v. Hansard; End. Stat. 182. A government and its agencies flagitiously disregarding moral laws, the sense of natural right and justice soon perishes from the earth. Oakley and Dimes cases; stated in Newcome, 58 Tex. 141, 44 Am. Rep. 604 (*Nemo debet esse judex,* etc.). P. v. Turner. "Where the laws of the Divinity are neglected, human laws do not prosper." *Summa ratio est; In præsentia majoris; Concordare leges.* See CHRISTIANITY. Riggs.

The view that constitutions and statutes may be construed to operate against superior laws (Rison) is not supported by all decisions Oakley and Newcome cases, *supra.* Words used by great conventions and parliaments are presumed from moral, intelligent and patrioric agencies; and they should be construed accordingly. *Verba intentione.*

Statutes are construed to exclude fraud. Lester: 341; 1 Kent, 465 (*mala fide* purchaser not protected, although the language of a statute includes him, under a registry act giving priority to claimants under prior registered deed). Riggs. S. v. Sheppard.

215. C. v. HESS (1892), 148 Pa. 98, 33 Am. St. 810, 17 L. R. A. 176, 23 Atl. 977. *Cited,* p. 33, Hughes' Proc.; §§ 119, 122, 136, 137, 203, 267, 294, Gr. & Rud.

Construction expands and contracts as exigencies demand, and according to the reason of the thing. Blake v. McClung. A change of circumstance is a change of case. *Modica circumstantia,* etc. To meet changes of circumstances and make the principles of the common law applicable, is the function of construction.

"This has sometimes been called the expansive property of the common law. If the great mass of legal principles which has descended to us under the name of the common law were composed only of iron-clad rules, it would be wholly unsuited to the present age and generation, and the great changes which have taken place, not only in the volume of business but in the mode of conducting it. We are constantly applying the accepted principles of the common law to new phases and modes of doing business. This is a necessity, dictated by common sense, and the necessities of trade." 2 Cool. Tax. 829. Absurdities are excluded. See ABSURDITIES.

The constitution of the United States is to be interpreted:

"In the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject, such as his ancestors had inherited and defended since the days of MAGNA CHARTA." South Carolina v. U. S. Mattox v. U. S., 156 U. S. 857; Tucker Const. 857; Murray: 219. *Concordare leges legibus,* etc.; *Lex non exacte definit.*

216. S. v. BOLDEN (1902), 107 La. 116, 31 So. 393, 90 Am. St. 280, n. *Cited,* p. 33; § 43, Hughes' Proc.; §§ 88, 122, Gr. & Rud.

Construction of statute—Expressio eorum, etc. A statute making it a crime to shoot at a person with intent to kill, without making reference to specific intent, must be construed with reference to legal principles, and so as not to cut off the right of self-defense. Hawaii. *Concordare leges,* etc.; *In pari materia; Verba intentione debent inservire.*

Constitutional law; reasonableness of statute. A statute, though unreasonable, can not be declared invalid unless it conflicts with constitutional principles. See ABSURDITY. Oakley.

Title of an act may be taken in connection with its other parts to assist in re-

Leading Cases.—216. Bolden.

moving ambiguities, if the intent is not plain. Bobel v. P.

A title to an act which serves to indicate its object can not be said to have misled the legislature at the time when it was adopted.

A county may contract an indebtedness in excess of its constitutional limitation, to carry on essential functions. *Sub,* Beard; 90 Am. St. 733.

There are cases in which the reason of the law should prevail over its letter:

"The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted that whoever drew blood in the streets should be punished with the utmost severity, did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling applied by Plowden, that the Statute of Edward II. which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire; for he is not to be hanged because he would not stay to be burnt."

S. v. Bolden; U. S. v. Kirby (1868), 7 Wall. 582. Hawaii; Harper: 218; Church v. U. S.; S. v. Sheppard.

In contrast is the view that under a statute the murderer of an ancestor must have his estate. Riggs: cases.

The rule in S. v. Bolden is the maxim *Lex non exacte,* etc., 1 Bl. Com. 61, 431. It was contended for by Coke, Hobart, Holt, Kent (1 Kent, 448) and Field. U. S. v. Kirby, *supra;* Indianapolis: 223: cases. *Ita lex scripta est.* Harper.

One may give liquor to a minor as a guest under a statute forbidding it in general language. P. v. Bird, 138 Mich. 31, 110 Am. St. 299.

Power of the judiciary to declare statutes void. Marbury; Dash: 237*a* (Kent), 450; *Cujus est instituere,* etc.; James v. Bowman (act of Congress cannot include crimes not intended by the constitution); Lonstorf (codes do not include rights not expressed).

217. DOVASTON v. PAYNE (1795), 2 Hen. Bl. (Eng.) 527, 1 Sm. L. C. 140-190, ext. n., 8th ed.; 11th ed. (reviewing English cases); 2 Gray, Cas. Prop. 580. Cited, pp. 7, 14, 16-26; §§ 1, 5, 8, 10, 16, 20, 22, 26, 27, 29-32, 35, 38, 78-82, 129, 155, 156, 204, 215, 217, Hughes Proc.; §§ 11, 101, 102, 108, 119, 124, 143-144, 149, 157, 171, 174, 182, 197, 202, 223, 237, 239, 267, 271, 278, 297, Gr. & Rud.

Dovaston stated: D.'s cattle were in the highway and P. distrained them therefor. D. replevined. P. pleaded his right to distrain and D. replied *the cattle were in the highway.* He did not aver they were *passing over* it. This was necessary and relating to this the pleading was uncertain, ambiguous or equivocal when read in the ligt of *Verba fortius accipiuntur contra proferentem* (every presumption is to be made against a pleader). The court would not presume P. was a trespasser unless

Leading Cases.—217. Dovaston.

this was alleged with certainty, which was not done. For ambiguity D. lost his case. His foundation was bad. An uncertain reply was fatal. *Debile fundamentum fallit opus.* Bro. Max. 180, 181. Buck v. Colbath.

Dovaston well illustrates that the rules of pleading are interactions, thus: The owner of land adjacent to a highway owns to the center thereof. His cession of it is for specified purposes only. *Expressio unius,* etc., namely, for uses of travel. This does not give the right to depasture it nor to herd nor stand cattle thereon. This is a trespass in the law of real estate, because the dedication or grant was not for that purpose. Therefore from this law of real property the pleading was construed and agreeably to one of Bacon's maxims which is first above quoted. It is of universal application however. It applies to all compacts, all documents. In procedure this maxim has a mystic influence and should be well comprehended. Where it is not, construction and procedure become unsettled. It may be called a rule of strict construction, still it is founded in close logic and good sense. For certainty it is necessary. It is a rule in *res adjudicata,* collateral attack and in all tests of an adjudication and wherever the question is, what was heard or adjudicated. It should be considered in connection with all these subjects, also in considering the function of the general demurrer, in searching the substantial pleadings, and in considering objections upon collateral attack. It should be comprehended in relation to the record or constitutional rule, namely, what ought to be of record must be proved by record and by the right record, also the *coram judice* rule, which is, consent cannot confer jurisdiction of subject-matter. Rushton: 5; Cruikshank: 232 (the study of procedure is a study of government); Davenport (Ill.); Moore; Sto. Pl. 10; Planing Mill.

De non apparentibus, etc. It applies in appellate procedure. The motion for a new trial and all that relates to the statutory record must affirmatively appear. Fast v. Gray, 105 Mo. Ap. 694. The averment that the cattle were in the highway could be accepted as perfectly true and still D., the owner, be liable. Proofs need not be broader than the allegation. 1 Gr. Ev. 63. Therefore had the plea been held good then all that D. would have to prove was that the cattle were in the highway. To prove they were passing over it was something additional to their being in it. This brings into view another basic and most important rule, which is, *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged). This is another phase of the rule requiring a recovery *secumdum allegata et probata.* Bristow; Fish.

Leading Cases.—217. Dovaston.

The rule of construction in *Dovaston* is the same in all states and in all systems. Certainty depends upon respect of those rules and of their equal and uniform application. Sto. Pl. 10, 240-256; Pain: 107; Hanford: 86 (conclusions of law construed against the pleader).

All courts respect these rules but not all uniformly or consistently, and the consequence is they unsettle jurisprudence. Lange: 159. Departures from fundamental principles and labeling it, "American" and the "modern," and the new and enlightened view, presents a very dubious outlook to every real and well instructed student. He will often see bewildering degeneracy and incompetence boosted and upheld by supposed leaders and teachers. Disregard of those rules and maxims introduces great confusion and as a consequence, the cases when gathered upon a page become incomprehensible. This results where affirmation and negation appear in the same volume or on the same page and thereon no reference to or citations of the fundamental. 2 Cyc. 691-692: cases; *id.* 715; 12 *id.* 372, 390; 16 *id.* 403-406; 2 Thomp. Tri. §§ 2310-2311; And. Steph. Pl. 230, 2d ed.: cases; Hughes' Prqc. pp. 7-33: cases, also its citations and extended discussions of *Dovaston.* Widely found works on the code may be cited either to sustain or deny the rule, the maxim or the principle involved. Possibly the codes and practice acts suffer from no other one cause so much as from a lack of comprehension of the rule in *Dovaston* and the *record* rule. See CODES. Windsor: 1 (important observations).

In final tests of whether a party was heard the rule of Dovaston leads. See *Res Adjudicata;* COLLATERAL ATTACK; *Audi alteram partem.* Whether one has been heard or not is often a question of the greatest import, especially where a judgment and its record are relied upon to prove a title or estoppel of record. Clem. Then it is that the record offered must show a matter upon which there could or might have been a hearing, and further, that an opportunity of a hearing was afforded. Windsor; Pennoyer; Haddock; Planing Mill. See L. C. 1-34, *ante.*

At all stages essential pleadings must withstand the test of the general demurrer and an application of the rule in *Dovaston.* See CAUSE OF ACTION.

Limitations of the liberal rule of pleadings are found in R. v. Goldsmith, U. S. v. Mills, Waters and Waverton: 20, 70-71. Upon close investigation, these limitations will be found consistent with *Dovaston* and the maxims. These should be considered with *Ut res magis valeat quam pereat.* Dobson.

From the above the student should determine whether or not procedure rests on universal principles, or whether it is a local or provincial subject. Works on procedure do not cite its great cases as works on contract, crime and tort cite notable cases thereon. But cases like *Dovaston* are expressly mentioned for denouncement by modern writers. Works widely advertised as student books exclude all such cases and discussions. J'Anson. See Preface.

Wherever records are necessary they must be produced and they must be sufficient to serve the purposes for which they are conceived. If not so then they should not be required; they should be dispensed with altogether. Vain and fruitless things should never be required in a system of rational procedure. To say that these records are not always tested by the same rules of construction or of certainty is a *reductio ad absurdum.* Failing to perceive this fact is a grave impediment to the progress of the student. This proposition will find support in connection with what is observed in reference to certainty, codes and construction.

The principle in *Dovaston* is also associated with these rules: "Consent cannot give jurisdiction of subject-matter"; "a court is bound by its record"; also this definition, "pleadings are the juridical means by which a court is invested with jurisdiction of a subject-matter to adjudicate it." The general demurrer searches the mandatory record and attaches to the first fault. What is a cause of action? When has it been heard? Can it be heard before it is properly stated in the right record? Is it tested by variant rules of construction from stage to stage or at different times?

Parties cannot by consent or waiver attract a larger or more liberal rule of construction; one that will include a subject-matter today that would not yesterday. Construction must be the same yesterday, today, tomorrow, and forever.

What one does not clearly plead and define he is presumed not to have. To illustrate, it could never be presumed that Dovaston had a license from Payne to pasture the highway, because P. did not plead it. To have proved it without pleading it would not avail. Fish (Ill.). *Probata* will not supply *allegata.* What ought to be of record must be proved by record and by the right record. Crain; Cruikshank; Planing Mill; Mallinckrodt, 12*a;* Dunlap, 105 Mo. Ap. 1, 127, 40 Mo. Ap. 525; 70 Mo. 524; 95 Mo. Ap. 94; Pennowfski, — Mo. —, 103 S. W. 542, 543: cases. See Preface.

Defenses not pleaded are waived. Every presumption is against a pleader. Cromwell; Field; McKyring; Marriot. As this rule is applied in *res adjudicata* so it is in all relations and at all stages. There are no distinctions in rational procedure.

The rule in *Dovaston* is only a partic-

Leading Cases.—217. Dovaston.

ular application of *Verba fortius, etc.* It is most instructive to consider this maxim in all relations. Hughes' Proc. 215-222. *Ambiguum placitum,* etc. *Ambigua responsio,* etc.

The allegation (U. S. v. Cruikshank), the admission and denial (Dickson: 34; Crain); and the issue (Munday: 79) are all governed by the rule in *Dovaston,* wherein it attached with fatal consequences to the reply. From this arose an implied admission. Dickson: 34; 48 L. R. A. 177-210, ext. n.; Pain: 107; Sto. Pl. 10, 253*a*, 665.

This rule is universal. The integrity of all the matters mentioned and of the conserving principles of procedure depends upon right conceptions of that maxim.

The maxims above cited should be thoroughly comprehended. It should be perceived that time has well justified Bacon's selection of *Verba fortius accipiuntur contra proferentem.* It often appears as a part of *Ignorantia legis neminem excusat.* Codes cannot abolish these. 64 Cent. L. J. 129-134; 169-174, 2 Hughes' Proc. 830-835.

A great question has arisen. Its chief gathering ground is New York, Indiana, Illinois, Missouri, Iowa and Colorado, with slight contributions from Texas, Arkansas and some other states. This question is the nature of procedure and its position in jurisprudence. Starting with the proposition that the study of procedure is a study of government, there necessarily is involved, in a discussion of this question, much that relates to constitutional law. By constitutional law we mean not only the written constitution, but beyond and underlying that, the unwritten or prescriptive constitution embraced in the maxims as well. The prescriptive constitution must be considered in determining the validity of legislation, and yet how little it is considered in some quarters! From any one of the states named, enough can be picked out to show that it is well and thoroughly taught as high-class—orthodox—"American law," that if a statute does not violate either the federal or the state constitution, then it is valid and must be accepted and enforced as law. Also that all matters relating to the mandatory record, the pleading, the allegation, the admission or the denial, and the issue, properly come within the province of legislation. What concerns the establishment and the effect of those matters has been conceded wholly to legislative discretion, and certainly so in Missouri, which for further illustration will be particularly mentioned. The result of such a view of the power of legislature is that it can make a judgment valid and binding, although the court did not have jurisdiction of the subject-matter, or the petition failed to state a

Leading Cases.—217. Dovaston.

cause of action. Missouri expressly concedes to the legislature a free hand for the establishment of judicial procedure. And the statutes enacted are heroically antinomian in character. For brevity we will state that they reverse the maxims: "Every presumption is to be made against the pleader," "It is vain to prove what is not alleged" and "What is not juridically presented, cannot be judicially considered." In general the mandatory record and pleadings were abolished as may be indicated by the following clauses from the statute of jeofails, and Amendments, 105 Mo. 469. *"Imperfections for which judgment will not be set aside";* * * * *"fifth,* for any mispleading, miscontinuance or discontinuance, insufficient pleading, jeofail or misjoining issue; * * * *eighth,* for the want of any allegation or averment on account of which omission a demurrer could have been maintained; *ninth,* for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict."

The foregoing is a sample of matter found on several pages relating to amendments, variances and aider by judgment, 105 Mo. 469. The eighth clause above quoted practically abolishes the general demurrer, and the rule that the general demurrer searches the entire record and attaches to the first fault and its cognate rules. It renders useless the motion in arrest of judgment, because all these defects are cured by the judgment itself. Further, it abolishes collateral attack, because the judgment cures all defects in the proceedings leading up to it. The statute in question extirpates the conserving principles of procedure as gathered and enumerated in Hughes' Procedure, pp. 8-14. This statute is opposed to the view that the study of procedure is a study of government. These statutes passed in consonance with the teaching that pleadings can be waived (2 Thomp. Tri., §§ 2310, 2311; And. Steph. Pl., § 230, 2d ed.) soon confronted the courts, which, of course, were implored to follow the statute because it was constitutional, and therefore there was nothing more to be said against it. The decisions show that many of the judges acquiesce, while others flatly nullify the statute. From the premises a great number of decisions have followed, and nothing less than an irreconcilable conflict is raging throughout administrative proceedings. Naturally the statutory record is involved, and it is made by courts which attempt to obey unconstitutional statutes, to serve functions for which it was never designed. The decisions show that the confusion over the uses of the mandatory and of the statutory records is a bewilderment. This without more, would disrupt any judicial establishment, which in its overwhelm

Leading Cases.—217. Dovaston.

drags government and empires with it. A government goes up or down as its laws are stable or unstable.

The claim for three degrees of certainty is a jargon of words. Dovaston; Windsor: 1.

What is not juridically presented cannot be judicially considered. Cruikshank; Fish: cases; Moore: 19: cases. *De non apparentibus,* etc.; *Frustra probatur.* McCarty; 144 Mo. 397, 402 (code); Mallinkrodt (code).

The discussion of the principles in Dovaston may be likened to that in Shelley's case, of which Kent made some observations that deserve to be well considered; therefore we quote them here:

"The juridical scholar, on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's case, which were so vehement and so protracted as to rouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skilful criticism, and refined distinctions, which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in Perrin v. Blake, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertations of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeve. What I have, therefore, written on this subject, may be considered, so far as my native state is concerned, as a humble monument to the memory of departed learning." 4 Kent, 267, 10th ed.; 233, 12th ed.

217a. BURKS v. BOSSO (1905), 180 N. Y. 341, 13 N. E. 58, 105 Am. St. 762.

Burks stated: A negro sued Bosso, a bootblack for a statutory penalty under a civil rights statute entitled:

"An act to protect all citizens in their civil and legal rights," and thereunder declaring, "Sec. 1. That all persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, bath houses, barber shops, theaters, music halls, public conveyances on land and water, and all other places of public accommodations or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.

Leading Cases.—217a. Burks.

"Sec. 2. That any person who shall violate any of the provisions of the foregoing section, by denying to any citizens, except for reasons applicable to all citizens of every race, creed or color, and regardless of race, creed and color, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay a sum not less than $100, nor more than $500 to the person aggrieved thereby to be recovered where said offense was committed; and shall, also, for every such offense be deemed guilty of a misdemeanor."

Bosso refused to polish Burks' shoes because he was black. For this he was sued and lost in the municipal court; he appealed and won in the county court; Burks then appealed to the appellate division where he re-secured a reversal of the county court. Bosso then appealed and finally won upon the ground that the above statute did not include a bootblack. The words "all other places of public accommodations" did not include the business of a bootblack. *Ejusdem generis.*

The negro is not a fortunate litigant in pursuit of civil rights. U. S. v. Cruikshank; U. S. v. Hodges, 203 U. S. 1.

A statutory offense cannot be established by implication. Burks v. Bosso; P. v. Phyfe (1893), 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 141; U. S. v. Wiltberger. Penal-criminal statutes are strictly construed. U. S. v. Wiltberger.

A general phrase preceded by a specific enumeration is limited and qualified by the latter. Verba generalia, etc.; *Noscitur a sociis; Ejusdem generis;* P. v. Richards (1888), 108 N. Y. 137, 2 Am. St. 373; P. v. R. R. (1881), 84 N. Y. 565; Sims v. Trust Co. (1886), 103 N. Y. 472; Hermance, In re (1877), 71 N. Y. 481; Mangam v. Brooklyn (1885), 98 N. Y. 585, 50 Am. Rep. 705.

General words enumerating matters of common law enumeration, followed by an enumeration of matters not of common law regulation, will not include matters of the latter class not enumerated. *Expressio unius; Verba intentione;* Burks.

Statutes in derogation of the common law are strictly construed. Burks v. Bosso; Lonstorf; C. v. Hess; Robinson v. R. R.

Remedial statutes are liberally construed is a rule that should be considered with the foregoing.

Verba fortius is a great rule of construction, from the Roman Norman-English and good federal and state cases.

218. HARPER v. CITY INSURANCE CO. (1858), 17 N. Y. 194. Bennett, Fire Ins. Cas. 247, 1 Bosw. 520, 22 N. Y. 441, Laws. Us. & Cust. 148, 1 Chit. Conts. 119, 120: cases, 24 Am. Rep. 150; Yoch, 111 Cal. 503, 34 L. R. A. 857 (S. P. Harper); Phœnix Ins. Co., 24 Ind. Ap. 87, 79 Am. St. 257, n.; cited, §§ 20, 180, 233, 234, 254, 256, 288, 289, 294, Hughes' Proc.

Harper stated: Custom and usage. A policy forbade the use of inflammables, *i. e.*,

Leading Cases.—218. Harper.

camphene. But usage is admissible to show that the condition was not intended to prevent the necessary use of that article used in printing. Whatever is contemplated is construed into it.

Robinson: 309; St. Louis Beef Co.; Iglehart, 204 U. S. 478; Fraim, 170 Pa. 151, 50 Am. St. 753 (gasoline forbidden in strongest language, yet a recovery was allowed). *Contemporanea exposito*, etc.; *Ad ea quæ frequentius; Benedicta;* Ans. Conts. 144, 306. See INTENT. Use of gasoline: 91 Minn. 382, 103 Am. St. 512*n*.

The expressed words of a contract control. Wigglesworth: 399; Heron, 180 Pa. 257, 36 L. R. A. 517 (a more strict rule followed); Barnard: 108.

Harper denied. German Fire Ins. Co., 54 Kan. 732, 45 Am. St. 306, n.; Church, 158 Mass. 475, 35 Am. St. 508, 19 L. R. A. 587-490, n.

Verba intentione, etc. Kemble: 391; *Communis error facit jus; Modus et conventio;* 1 Chit. Conts. 104; Howard v. Harris.

Cessation of tenancy caused by a change of tenants is no violation of a stipulation against vacating the premises. Liverpool Fire Ins., 38 Neb. 146, 41 Am. St. 724, n. "Vacant and unoccupied": meaning of these words in policy. Moore, 54 N. H. 140, 10 Am. St. 384-397, ext. n.

Suicide while insane will not forfeit policy stipulating against self-destruction. Sub, Volenti, etc. See Billings (*Contra:* cases.) Death due to "the inhalation of gas," means voluntary inhalation. Pickett, 144 Pa. 79, 5 Am. R. R. & Corp. Rep. 143, n. What are self-inflicted injuries. Fidelity, etc., Co., 93 Va. 138, 40 L. R. A. 342-452, ext. n.

Accident insurance. Death by disease is no ground for recovery. A malignant pustule caused by exposure of a wound to disease is death from disease. Bacon, 123 N. Y. 304, 3 Am. R. R. & Corp. Rep. 352.

Indorsing a note "without recourse" nevertheless warrants that it is genuine and unpaid. A thing in esse is warranted. § 134, Hughes' Conts.; *Expressio eorum*, etc.; *Caveat emptor.*

Paralysis caused by a pistol shot and resulting in non-use of feet is entire loss of two feet in meaning of policy. Sheanon, 77 Wis. 618, 9 L. R. A. 685, 3 Am. R. R. & Corp. Rep. 426-428 (construction favors indemnity); *Ut res magis*, etc. McGlinchey, 80 Me. 251, 6 Am. St. 190 (assured favored by construction).

Construction. Ut res magis, etc.; *Ad ea quæ frequentius*, etc.; *Verba intentione*, etc. Crooker v. Holmes (negotiable instrument); 1 Chit. Conts. 119-120: cases.

A policy concluded "nullus exceptis" (without any exception), the assured was to be paid. The goods were damaged by the act of the assured himself. Now, from the reason of the thing, exceptions were grafted in that policy, and even against broad and sweeping language. Bro. Max. 696; *Nulla pactione*, etc.; *Pacta*, etc.; *Nullus commodum capere*, etc.

Intention of parties controls. Hallett, 1 Tay. Land. & Ten. 38; Gotthelf, 138 N. Y. 345, 20 L. R. A. 455, n.; Lovelace, 126 Mo. 104, 47 Am. St. 638, 30 L. R. A. 209, S. v. Chauvet (1900), 111 Ia. 687, 83 N. W. 717, 82 Am. St. 539, 51 L. R. A. 630 (a covered wagon moved from place to place, in which prostitution is carried on, is a bawdy-house in the meaning of a statute prohibiting such). *Quando verba statuti; Quando verba*, etc.; *Verba nihil operari*, etc.; *Verba offendi*, etc. Words, how construed. See *Verba*, etc.; Iglehart, 204 U. S. 478.

219. MURRAY'S LESSEE (or MURRAY) v. HOBOKEN LAND AND IMPROVEMENT CO. (1855), 18 How. 272, Curt. Abr. 227-240 (15 L. ed. 372), Thayer, Const. Cas. 600, Myer, Vested Rights, 250, McClain, Const. Cas. 895, 106 Wis. 437, 80 Am. St. 41, 1 Tex. Ct. App. 619; Cool. Const. Lim.; 2 Cool. Tax. 1341; 2 Dill. Corp. 754, 2 Tucker, Const. 390; Suth. Stat. 5, 142 (quoting definition), 201 U. S. 254; Ballard v. Hunter, 204 U. S. 241 (due process of law has never been defined).

Citcd, pp. 11, 17; §§ 5, 5*a*, 6, 8, 19, 28, 52, 78, 121, Hughes' Proc.

Cited, §§ 93, 108, 119, 152, 159, 214, 263, 268, Gr. & Rud.

"Due process of law" discussed and defined. The guarantee of, in the 5th Amendment to Constitution of the United States, construed as in *Magna Charta* and under the English Common Law. It is not local or provincial law. It means the same thing as the "law of the land," or the due administration of the laws. It is derived from *Magna Charta.* By construction, the laws of England are adopted and are made the same. And so American law is patterned after the English as a model. S. v. Moore, 222*a*.

"Due Process of Law" generally implies and includes *actor* (plaintiff), *reus* (defendant), *judex* (judge), regular allegations (Rushton), opportunity to answer (Windsor), and a trial according to some settled course of judicial proceeding. 18 How. 280, 2 Inst. 47, 50; Taylor; Hoke v. Henderson (1833), 2 Dev. Law (N. C.), 1, 25 Am. Dec. 676-705, n.; Great Opin. Great Judges; Suth. Stat. 5; Cool. Const. Lim. 432; Kent, *q. v.;* 1 Beach, Pub. Corp. 173, 188; Hurtado; Cruikshank; Carr, 20 R. I. 215, 78 Am. St. 855: cases; Definition; Huntsman, quoting the above; Rosen; Howard v. Fleming (states may invade).

What records must show. Harvey: 123; Piper: 114; Windsor; Munday; Stubbings (*placitum*); Nixon: 127.

Allegations are indispensable for "due process of law." Cruikshank: 232; Munday: 79; *Frustra probatur*, etc.; Shutte: 291. J'Anson: 91.

The judiciary must inquire into the constitutionality of a statute; all judges are

Leading Cases.—219. Murray's.

charged with this duty, from the greatest to the least. Hoke, *supra;* Marbury. See SUPREME LAW OF THE LAND.

Limitations of legislative interference with procedure. Huntsman: 231; S. v. Beach: 258; Bates: 225; Dovaston: 217.

A valid warrant or execution may issue upon the record made by a solicitor of the treasury of the United States against a defaulting revenue officer, under a statute authorizing it. The amount found to be due in the treasury records will support the warrant in behalf of the government, and such a record and warrant will support a sale of land founded thereon. Murray. See TAXATION; Public Clearing House, 194 U. S. 497 (need not involve judicial process).

Auditing and stating such an account has the force and effect of an adjudication and will support the warrant, which need not issue from the judicial department. Such procedure does not violate the division of state power. See DIVISION OF STATE POWER.

The return of the marshal, that he had levied on lands, on such a warrant, is *prima facie* evidence that there was no personal property on which he could levy. See Crepps: 113; Walker: 118; Harvey: 123; Hannah: 128; RETURNS; *Omnia præsumuntur rite,* etc.

Certificates of doubt will remove a cause in federal procedure as by appeal or error. See *Id.;* Waco: 300.

Constitutions deal in general language (P. 276). *They do not include codes and details.* M'Culloch: 147; Cohens: 244. Words and phrases used in a constitution are given a common-law meaning if possible. Work v. S.: 242; S. v. Baughman: 268; C. v. Hess: 215; S. v. Townley: 225*a;* Montgomery Co.: 47.

A record evincing, all essential accompaniments of an adjudication is implied. Freem. Judg. 37, 76; Montgomery; Iverslie: 46.

Due process of law involves all the elements of jurisdiction. Generally this is defined to include jurisdiction of the person, of the subject-matter and place. Turney. But there are many other elements. See JURISDICTION; Munday; Harvey; Nixon; Walker; Piper; Milligan's Case; R. v. Keyn; C. v. Macloon; Mostyn; S. v. Baughman: cases; COLLATERAL ATTACK; *Audi alteram partem;* DUE PROCESS OF LAW.

Omnia præsumuntur rite, etc., is a rule that profoundly disturbs jurisdiction. It is quite well settled in England, and in Massachusetts and some other states. Crepps; Piper. In some states relating to it judicial anarchy prevails. See Harvey: 123. A definition of due process of law for those familiar with fundamental law can not prove difficult. But it is to be borne in mind that widely differing intellects are discussing the subject and

Leading Cases.—219. Murray's.

manifestly many who have no conception of the prescriptive constitution and its organic requirements. See observations under Windsor: 1; Rushton: 5; J'Anson: 91; Lange: 159; Dovaston: 217.

Due process of law has always been a requirement of organic law in a constitutionalism. A government of limited and defined powers can not be operated for the public tranquillity, for the general welfare—upon shams, frauds, mockeries and violence. These are inimical to due process of law, as well as the exercise of all whims, caprice, affections or antipathies of governors or magistrates. The exercise of arbitrary power in all its forms is opposed to due process of law; and it matters not whether the offence is from executives or legislatures or the judiciary.

Juridical due process of law is the exercise of judicial power for the establishment of any of its varied ends and purposes conformably to fundamental requirements and evincing all of the essential proceedings by the right record. Planing Mill Co. v. Chicago: 2*d.* (Right record essential).

In a general sense it may be said that only the *coram judice* proceeding can satisfy the requirements of due process of law. The discussions in Windsor and Cruikshank suggest many elements of due process of law, which must be defined from an understanding of the conserving principes of procedure, of the maxims and cases which support those principles.

Any generalized statement from a comprehension of the prescriptive constitution, its maxims and conserving principles will be a good definition of due process of law. Its definition must spring from the fundamental maxims of government; it must be conceived from eternal laws, from the law of all ages and climes, and be a definition for all ages and for all climes.

219a. TAYLOR v. PORTER (1843), 4 Hill, 140, 40 Am. Dec. 274; Cool. Const. Lim.; Suth. Stat. 5; Tiede. Pol. Power; McQuillan's Munic. Ord. 495; 78 Am. St. 858; Wynehamer v. P. (1856), 13 N. Y. 378-488; Carr, 20 R. I. 215, 78 Am. St. 855: cases; Hughes' Conts.

Cited, §§ 28, 45, 76, Hughes' Proc.

Cited, §§ 116, 140, 268, 296, Gr. & Rud.

Law of the land—Due process of law defined. "'You shall not do wrong unless you choose to,'" is not the meaning of a constitution for any class or grade of officials. Usurpation is a grave offense and must be avoided.

4 Hill, 145, 40 Am. Dec. 274, Cool. Const. 432, 6th ed., 78 Am. St. 859. Paramount law, and all officials must act within it. Lange: 159; Windsor: 1; Coster, 18 N. J. Eq. 54-72, 90 Am. Dec. 634 (limitation of power to take property); Allen v. Jay; Talbot, 16 Gray, 417; Cool. Const. Lim.; Wurts, 114 U.

Leading Cases.—219a. Taylor.

S. 606; Dayton Min. Co., 11 Nev. 394. See Millett; DUE PROCESS OF LAW; TAXATION; Tiede. Pol. Power; Story v. El. R. R.

The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. Wilkinson v. Leland, 2 Pet. 627 (Story, J.); McQuillan's Munic. ord. 495. Dash, 237*a*.

Limitations of legislative power to regulate contracts. Cannot regulate the hours of labor. Cleveland, 67 Ohio, 197, 93 Am. St. 670 (quoting Taylor); Millett; P. v. Marcus, 185 N. Y. 257, 113 Am. St. 902.

The right to contract is within the prescriptive constitution, with which written constitutions must accord. The assent to, and the consideration for a contract must be respected in every government of defined powers which protects property from confiscation by insidious construction which is but another name for usurpation. The modern and American law may vary formal matters of contract, like the evidence of contract, also illegality of contract, but the Roman Norman-English law of assent and consideration can not be changed.

The law is above government and its agencies. Hughes' Proc., § 204. The maxims of the law ever attend and expand or contract the words of constitutions. *Lex non exacte,* etc. There are limitations on government to create crime. P. v. Turner: 252; S. v. Brown, Wash., 107 Am. St. 798, n.; also over property. Muhler v. Harlem R. R., 199 U. S. 544; Story v. El. R. R.; S. v. Kelly; Hanson v. Kreibiel; 201 U. S. 245.

Constitutions are the supreme laws of the land. Taylor; Cochran, 20 Wend. 365; Blair: 254; P. v. Turner: 252; Oakley; Rison; *In præsentia majoris,* etc. See CHRISTIANITY. S. v. Kelly; Virginia Coupon Cases, 285*a;* Berger, 193 Mo. 90, 112 Am. St. 472; See S. v. Sheppard (Mo.).

A statute cannot authorize administration proceedings upon a living man's estate, because he is absent and unheard of. Carr, *supra;* Selelen's, 104 Va. 826, 113 Am. St. 1076-1080. A wronged party is essential for "due process of law." When that fact does not exist it cannot be fictitiously declared. Statutes cannot create it. Springer: 24; S. v. Baughman: 268. *Fabula.*

The essentials of "due process of law" is an irreducible minimum, and these cannot be abolished by statutes nor destroyed by constitutional courts. One of those essentials is a party who has committed a wrong; this is essential to invest a court with jurisdiction. The rights of no living person, who is free of wrong or deliction, can be lawfully disturbed. Springer; Carr. Essentials of "due process of law" are within constitutional protection. Essential parts of that guaranty must be protected for the integrity of the whole.

"The power which is entirely and exclusively vested in the judiciary department is the power conferred on judicial courts and tribunals to administer punitive and remedial justice to and between persons subject to or claiming rights under the law of the land. The exercise of this power includes invariably *actor, reus* and *judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings. It is part of this judicial power to determine what this law is; and all questions involving the validity and effect of statutes when thus determined are authoritatively settled."

Suth. Stat. 5: cases. See *Stare decisis; Ita lex scripta est; Lex est misera,* etc.; *Nihil in lege intolerabilius,* etc.; S. v. Baughman: 268.

This power is reckoned from the conserving principles of procedure. §§ 83-123, Gr. & Rud. It is derived from the maxims. J'Anson: 91; Dovaston: 217; Oakley: 222.

220. HURTADO v. CALIFORNIA (1884), 110 U. S. 516 (28 L. ed. 232); Boyd, Const. Cas. 534, 1 Thayer, Const. Cas. 616, McClain Const. Cas. 905, And. Am. Law, 1027, 2 Tucker, Const. 390, 201 U. S.: 254.

Cited, p. 11; §§ 13, 19, 35, 61, 161, Hughes' Proc.

Cited, §§ 93, 152, 157, 159, 214, Gr. & Rud.

One may be prosecuted under an information, if permitted by a constitution, instead of by indictment. Such information satisfies the demands of "due process of law." There must be either an indictment or information. Hurtado v. California; R. v. Wheatley; Moore v. C. There must be a presentment, and it must charge a crime. Regular allegations essential. Murray v. Hoboken; U. S. v. Cruikshank.

"Due process of law" means certain fundamental rights which that system of jurisprudence of which ours is a derivative has always recognized. Windsor. Any proceeding permissive of these is sufficient. Hurtado. The form and garb may be changed, but the substance must be the same. Davis, 179 U. S. 399; Louisville R. R., 177 U. S. 230: cases; Maxwell, 176 U. S. 581: cases; Winona, 159 U. S. 526 (either of two assessments are good if only an opportunity to be heard is afforded). See Cool. Tax., 3d ed.; Welty, Assess. 250-253; *Nil facit error nominis,* etc.; NAMES; *Scientia sciolorum,* etc.; *Scire leges,* etc.; *Scire proprie est, rem ratione,* etc.; *Præsentia corporis.*

221. WILKERSON v. UTAH (1878), 99 U. S. 130 (25 L. ed. 345); stated, Laws. Lead. Cas. Const. Law Simp. 293; cited, 1 Bish. C. L. 946, 1 McClain, Const. Law, 80: cases (cruel and unusual punishments). Cited, § 19, Hughes' Proc.

Constitutional law; "cruel and unusual punishments." Shooting is not a cruel and unusual punishment. Wilkerson; *Magna Charta;* 2 Kent, 13; stated, Garvey, 48 La. Ann. 527, 35 L. R. A. 561-580, ext.

Leading Cases.—221. Wilkerson.

n.; Kemmler, 136 U. S. 436, 446; Kemmler, 119 N. Y. 569, 16 Am. St. 859, n. *construction of all documents.* O'Connell: L. R. A. 561 (accused may be electrocuted); C. v. Murphy, 166 Mass. 66, 30 L. R. A. 734, n.; Hobbs, 133 Ind. 404, 18 L. R. A. 774, n.; Birdsong, 39 Fed. 599, 4 L. R. A. 628, n. Enhancing penalty of crimes when committed by habitual criminals or prior offenders. Miller, 110 Mich. 676, 34 L. R. A. 398-408.

222. OAKLEY v. ASPINWALL (1850), 3 N. Y. 547; End. Stat. 348, 428, 430; Hughes' Conts. Cited, pp. 32, 33; §§ 5-5*b*, 7, 9, 11, 20, 21, 28, 40, 51, 52, 67, 76, 158*a*, 160, 166, 167, 178, 203, 204, 206, 236, 276, 278, Hughes' Proc.

Cited, §§ 5, 46, 80, 106, 111-119, 120, 122, 134, 137, 139, 163, 262, 263, 266, Gr. & Rud.

Fundamental principles annex themselves in construction of all documents. O'Connell: 223; Dash: 237*a*; C. v. Hess.: 215; Bro. Max. 19; 1 Bl. Com. 42. And, therefore, a constitution creating a court, to consist of eight judges, nevertheless yields to the rule, *Nemo debet esse judex in propria causa.* See *Audi; Expressio eorum,* etc. P. v. Turner: 252; Rison; S. v. Bolden: 216.

Courts by implication may defensibly annex principles of natural and fundamental right, because this is for the public welfare. See Preamble of Const. U. S.; O'Connell; P. v. Turner: 252; C. v. Hess; Trist: 214; *Concordare leges legibus,* etc. §§ 351, 352, Hughes' Proc.

Consent cannot confer jurisdiction upon an interested judge. Dimes: 176.

Statutes are construed subject to natural rights and fundamental equity. S. v. Bolden; *Lex non exacte,* etc.; Day v. Savadge (1620), Hobart, 85; Church v. U. S.; S. v. Sheppard; Kollock (Code); State v. Fox, 158 Ind. 126, 132; Rathbone, 150 N. Y. 359, 34 L. R. A. 408 (there is an unwritten constitution); P. v. Town of Salem. See 101 Am. St. 971, 27 Utah, 387. *Lex non exacte,* etc. S. v. Braxton (1906), — W. Va. —, 55 S. E. 382; Wright v. Hart (1905), — N. Y. —, 75 N. E. 404.

Constitutions sometimes place limitations on the indebtedness of governmental agencies, such as counties, etc. But for necessary expenses of county organizations and for protection that indebtedness may be exceeded. Consequently, necessity appears as the higher law. Beard v. Hopkinsville: cases; Harper: 218.

222a. S. v. MOORE (1853), 26 N. H. 448, 59 Am. Dec. 354-359, n. Cited, §§ 37, 276, Hughes' Proc.; § 139, Gr. & Rud.

English Common law adopted in American states. S. v. Moore; S. v. Calhoun, 50 Kan. 525, 34 Am. St. 141, n.; Sedgk. Stat. 4, 13; 1 Kent, 473; 21 Am. Law Reg. (N. S.) 253-274; McKennon, 1 Ok. 327, 23 L. R. A. 501-512, ext. n.; Chilcott, 23 Colo. 40, 34 L. R. A. 41, n.;

Leading Cases.—222a. Moore.

Cool. Const. Lim. 32-35; S. v. Foster, 5 Wyo. 199, 63 Am. St. 47, n., 29 L. R. A. 226. Limitations of extent. Katz Case, *sub,* Water.

Adoption of a statute from another state brings with it the construction there given it. James v. Appel (1904), 192 U. S. 129, 135: cases; Tuckers v. Oxley (1809), 5 Cranch, 42.

Borrowed statutes are given their home construction. S. v. Moore; Laporte, 146 Ind. 466, 58 Am. St. 359, n. (same rule as to a constitution); Suth. Stat. 191: cases, End. Stat. 368; Wells, Res. Adj. 490; 1 Wh. Ev. 311; 1 Bish. Stat. Crim. 397: cases; Sedgk. Stat. 362: cases; Cool. Const. Lim. 66, n., 6th ed.; American Print Works; Rouse; Watson, 52 N. J. Law, 350, 10 L. R. A. 784 (acceptance is peremptory); Brown v. Walker (1899), 161 U. S. 591.

In adopting a foreign statute, its construction follows it. 192 U. S. 133: cases; *Ubi eadem ratio,* etc. *Cf.* 31 Colo. 82.

All laws are interpreted in the light of the old law—the common law. C. v. Hess: 215; Murray: 219. *Concordare leges legibus,* etc.

223. INDIANAPOLIS & ST. LOUIS R. R. v. HORST (1876), 93 U. S. 291, 149 U. S. 207; 190 U. S. 215; Fost. Fed. Practice.

Cited, pp. 32, 33; §§ 5, 7, 10, 23, 28, 31, 37, 40, 41, 43, 52, 82, 152, 206, 236, 239, 292, 352, Hughes' Proc.; §§ 33, 80, 114, 119, 134, 135, 137, 140, 147, 151, 156, 240, 262, 263, 268, 297, Gr. & Rud.

Federal courts follow the law of the state in which they are sitting. This rule is binding in all matters of substance, such as that there shall be a statement of the claim or defense, and subsequent proceedings to raise the issues of law or fact in the case.

"Such law is undoubtedly obligatory upon the courts of the United States in that locality. There may be other things, not necessary now to be specified, with respect to which it is also binding." (93 U. S. 300.) "But where it prescribes the manner in which the judge shall discharge his duty in charging the jury, or the papers which he shall permit to go to them in their retirement, as in Nudd v. Burrows, or that he shall require the jury to answer special interrogations in answer to their general verdict, as in this case, we hold that such provisions are not within the intent and meaning of the act of congress, and have no application to the courts of the United States. These are all matters relating merely to the mode of submitting the case to the jury. The conformity is required to be 'as near as may be'—not as near as may be *possible,* or as near as may be *practicable.* This indefiniteness may have been suggested by a purpose; it devolved upon the judges, to be affected, the duty of construing and deciding, and gave them the power to reject, as congress doubtless expected they would do, any subordinate provision of such state statute which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat

Leading Cases.—223. Ind. & St. L.

the ends of justice, in their tribunals." See Shepard, *sub*, O'Connell.

"*While the act of congress is to a large extent mandatory, it is also to some extent only directory and advisory.* The constitution of Indiana, Art. 7, § 5, requires that 'the supreme court shall upon the decision of every case, give a statement of each question arising in the record of such case, and the decision of the court thereon.' This was held to be directory and not mandatory. Willetts v. Ridgway, 9 Ind. 367.

"The criminal code of practice of Arkansas provided that the court should admonish the jury that it was their duty not to allow any one to speak to them upon any subject connected with the trial until the case was finally submitted to them. It was held this provision was only directory and cautionary, and that the omission to comply with it was not error, and did not affect the validity of the verdict."

Thompson v. S., 26 Ark. 326. See also Wood, 4 Lans. 86; S. v. Carney, 20 Ia. 82; Bowers, 32 Cal. 66; Hill, 40 Miss. 618; 93 U. S. 301.

There shall be a statement of claim, is a requirement of codes that is mandatory; and not upon federal courts alone, but upon state courts as well. Windsor: 1; Campbell: 2; Munday: 79; Borkenhagen: 81; Kollock; Wisconsin Co. v. Bullard. Essentials for a defense, for raising issues, are also described, and these are also mandatory. Munday.

Statutory power to interfere with procedure has limitations, and codes should be accordingly construed.

General exceptions insufficient. Harvey: 123; Hickory: 194; Miller v. Dill: 290*b*-299.

The Missouri statute of jeofails and amendments (R. S. 1899, § 672), is of the widest and most general character. It prescribes Aider by Waiver, by verdict and by judgment, not only of formal, but of substantial defects. Three of the many clauses which attempt to cure defects in pleadings, are as follows: "Fifth, for any mispleading, miscontinuance or discontinuance, insufficient pleading, jeofails or misjoining issue; * * * *eighth*, for the want of any allegation or averment on account of which omission a demurrer could have been maintained; *ninth*, for omitting any allegation or averment without proving which, the triers of the issue ought not to have given such a verdict." The statute thus attempts to cure not only defects in form, but defects in substance. Notwithstanding this, the Supreme Court of Missouri has, in many cases, disregarded the statute and held that the legislature cannot cure substantial defects relating to the mandatory record. Mallinckrodt: cases; Dobson: cases; 96 Mo. Ap. 556; 69 Mo. 281; Pennowfski, — Mo. —, 103 S. W. 542; S. P. Planing Mill Co. v. Chicago: 2*d*.

General language is restrained by the nature of the subject matter and the principles of the common law. End. Stat. 182; C. v. Hess: 215.

There are many decisions in Missouri which practically nullify the words of the above statute, and further, the constitution itself is nullified when it contravenes moral laws. S. *ex rel.* Henson v. Sheppard. *Concordare leges legibus est optimus interpretandi modus.*

224. O'CONNELL v. REED (1893), 56 Fed. 531, 5 C. C. A. 586-608, n., 12 U. S. App. 369: cases.

Cited, p. 33; §§ 1, 7, 9, 10, 13, 17, 19, 20, 21, 23, 28, 37, 40, 42, 43, 52, 61, 82, 102, 126, 145, 152, 161, 169, 199, 206, 236, 239, 275, 292, 350, Hughes' Proc.

Cited, §§ 119, 262, Gr. & Rud.

Legislative limitations, construction. State laws that "unwisely incumber the due administration of the law, or tend to defeat the ends of justice in their tribunals," will not be enforced or respected in United States Courts. Indianapolis: 222 (mandatory and directory statutes); Association, 131 U. S. 109, 120, 9 S. C. Rep. 755 (state statute requiring a special verdict may be disregarded); Erstein, 22 Fed. 61, 64 (amendment of writs allowed of attachment affidavit when denied by the state courts). Statute changing time of service of summons need not be followed. Shepard v. Adams (1898), 168 U. S. 618; Southern P. R. R., 146 U. S. 202, 13 S. C. Rep. 44; R. R. v. Pinckney (1893), 149 U. S. 194 (state statute cannot make a special appearance a general one).

Construction of statutes should be reasonable, uniform and of general operation. End. Stat. 182, Suth. Stat. Construc. 288; *Cessante ratione legis*, etc.; *Verba nihil*, etc.; Bates: 225. *Concordare leges legibus*, etc.

A statute provided that where there was a failure of consideration, this might be pleaded. Under this statute a defendant pleaded the language of the statute, *i. e.*, "that there was a failure of consideration," this being a mere conclusion of law. The court properly *held* such a plea insufficient, for the reason that facts, not conclusions must be pleaded. *De non apparentibus*, etc. Taylor v. Sprinkle (1819), Breese (Ill.), 1; Cornelius, *Id.*, 23; Poole, *Id.*, 47; Bradshaw, *Id.*, 133; Sims, *Id.*, 302 (best statement). The principle in Rushton was involved in these cases. A statute can dispense with a plea; so *held* in Brazzle, Breese, 35. See Israel: 83.

A judgment record book is essential in the due administration of justice. 1 Freem. Judge 37, 75. See JUDGMENTS.

Legislatures cannot abolish rules requiring allegations of certainty. Huntsman: 231. McLaughlin v. S., 4 Ind. 338; Moore v. C.; Cool. Const. Lim. 327; P. v. Turner: 252. See SUPREME LAWS; LITERATURE. An existing defense cannot

Leading Cases.—224. O'Connell.

be divested. Terry: 240. Nor a ground of recovery. Dash: 337*a*.

Laws must be made to harmonize. Concordare leges. Oakley: 222; P. v. Turner: 252. See SUPREME LAWS.

225. BATES v. BULKLEY (1845), 2 Gilman (Ill.), 359. *Cited,* pp. 8, 9, 14, 15, 17, 32; §§ 7, 10, 12, 13, 17, 20, 23, 28, 43, 52, 122, 145, 203, 206, 236, 276, 352, Hughes' Proc.

Cited, §§ 84, 91, 102, 108, 122, 134, 183, 188, Gr. & Rud.

Bates stated: The provisions of a statute were that there should be no written pleadings in a justice's court. Nevertheless the court held that the parties must orally state the grounds of recovery and of defense, and that the justice must note these statements on his docket, for means of showing *res adjudicata.*

The rationale of this view will appear from the following observations:

For a strict construction of such a statute there is some reinforcement in the old rule that a justice's court is just what the statute makes it, no more and no less. *Ita lex scripta est* is often quoted to uphold such statutes. Many cases show that great regard is given such appeals by courts.

Lex non exacte definit, etc. But there are other views, and among these are that the judicial department is charged with carrying forward the due administration of the laws and of affording protection according to due course of law—"due process of law." Constitutions charge the judiciary with great responsibilities, and for the proper discharge of these "statutes unwisely encumbering the due administration of the laws and tending to defeat the ends of justice" will be disregarded. From these views, courts have great inherent powers, above and independent of legislatures. Coke, Hobart, Holt, Mansfield, Marshall, Kent, Story, Shaw and Field contended that something was always left to the discretion of a wise man. S. v. Bolden: 226.

Procedure has its conserving principles, of which *res adjudicata* is one, as elsewhere enumerated, for the extension of that protection which courts are charged with. For no other purposes are justices' courts and other inferior and statutory tribunals created and maintained.

Records are a constitutional implication. For the latter, records are provided, and by implication this means much. The common-law record is implied. 1 Freeman, Judg. 37, 76. Whenever records are provided, it means they shall be used, and also that this rule shall be respected: "What ought to be of record shall be proved by record and by the right record." Iverslie: 46. That those things essential in the scheme of protection shall be shown from the record. If the prescription for the record does not mean this, then it is tenable to say it would

Leading Cases.—225. Bates.

better be omitted altogether. None will contend for such a radical and absurd view as that, for vain and fruitless things are not required. In rational procedure these are always excluded as absurdities—which are always excluded in sound construction. *Lex non cogit ad vana,* etc.

For the scheme of government, what shall this record show? Is it sufficient to enter only one thing, say the name of a plaintiff, or shall more appear? All will admit the name of a defendant must appear. But there are other things equally important; for the court can not sit on holidays or Sundays; process must issue, and it must be served by a proper officer in the right time and territory and in a certain way, unless there is an appearance or notice is otherwise given, but anyway this must appear; court must convene at the right time, and proceed to *adjudicate a particular controversy relating to a subject-matter within the court's jurisdiction,* and a certain judgment must be entered and appear of record. See Piper, 114: cases; Ransom: 122: cases. Nixon; Hannah: 128.

Every coram judice proceeding has certain accompaniments which must appear of record. Cases that stand for a relaxation of old safeguards concede this. Harvey: 123.

Of these things above enumerated, can any be dispensed with? This is the question. Can any material fact be omitted from a pleading? Rushton; McAllister; Hopper; Pennoyer.

One of the most important things to serve the high policies mentioned is, what particular controversy—what "cause of action"—was adjudicated. This is of leading consequence for purposes of the high policies of protection. Beaumont: 367.

The functions of pleadings in courts of record are to describe and define—to identify—that *subject-matter.* See IDENTIFICATION. What crime, what deliction, what wrong, must be made certain? No one thing above enumerated to appear of record is of greater consequence in the due administration of the laws, than to know what *subject-matter* was before the court. It must be identified. Cruikshank; Huntsman: 231. See ALLEGATIONS; L. C. 1-26.

Now if a record is provided for the court, surely it must attest the essential facts and matters constituting an adjudication. Where pleadings are excluded, there only remains the record to show what was passed upon, and for this leading essential the court, in Bates, decided that the parties must orally state their claim of wrong or of defense, and that these should be made of record and appear from the record. Any other view would make the provision for the record absurd and a vain and useless thing.

Leading Cases.—225. Bates.

Now, absurdities are always excluded by construction, and vain and useless things are never respected in a rational system of procedure. *Lex neminem cogit ad vana seu inutilia peragenda; Uno dato absurdo infinita sequuntur.*

From the conserving principles of procedure the footing for the view of the court in Bates is ample and most defensible.

While there are no pleadings in justices' courts in Illinois, Colorado and other states, still, wherever abatement matter may be raised before a court it must be in the form of pleadings, and the most technical of pleadings too. See ABATEMENT. The fact is, there are many things added by judicial decisions to the statutory provisions regulating procedure for any grade of court.

Courts that do not construe for the integrity of the conserving principles of procedure, or of protection, make of it a mire of confusion and inconsistency. This should be avoided, as it was in Bates. No branch of the law is better calculated to afford protection from oppression than *Res adjudicata.* For its integrity courts should construe. As a means of protection courts must preserve it, and legislatures cannot destroy it. It should be presumed they did not intend to. *Expressio eorum,* etc.; *Verba intentione debent inservire; Concordare leges legibus,* etc.

See Huntsman: 231; Cruikshank; Moore: 21; Tex. R. R. v. Humble.

It is instructive to observe how the rules and the requirements of one subject act and re-act on another. A court should construe for *Res adjudicata,* and therefore necessarily its means, and also the means of the rule quoted in Ransom: 122, among other conserving principles.

Statutes regulating procedure; how construed. Indianapolis: 223; *Concordare leges legibus,* etc.; *Lex non exacte,* etc.; *Verba nihil operari melius est quam absurde;* End. Stat. 182.

The record in some form and under some name must exist for the scheme of government. It cannot be abolished. It is the sole means of proving many important things. Iverslie: 46; Moser; Hannah: 128: cases. It is essential wherever one is condemned, or his property is sequestered, or any obligation is imposed by law. This principle is applicable to all judicial, *quasi*-judicial and administrative proceedings. Throughout the law there must be authority for the exercise of every act, and this must appear somewhere, either in the files of a court of record or from the face of the record of inferior and statutory proceedings. Nowhere, not even in courts of record, are jurisdictional facts supplied by intendment or presumption. They must affirmatively appear of record somewhere, for "what ought to be of record must be proved by record and by the right record." See Iverslie; *Res adjudicata; Audi alteram partem; De non apparentibus.* MANDATORY RECORD.

Statutory record must affirmatively show that it includes all the evidence, else it will be presumed there was other evidence and sufficient to sustain the verdict. Bates; Grand Trunk R. R.: 290c; Richardson: 299; *Verba fortius.*

This important rule of the statutory record must not be confused with the mandatory rule relating to the common-law record, requiring it to show affirmatively every jurisdictional fact necessary for the exercise of jurisdiction. The last rule is one of public policy and cannot be condoned or waived, while everything relating to the statutory record may be waived. These records are for widely differing purposes, as is elsewhere shown. §§ 83-123, Gr. & Rud.

In all courts a statement of the issues should be made before a trial proceeds. Bates; Gay: 138; Adams v. Gill. See Franklin Lodge.

225a. S. v. TOWNLEY (1902), 67 Ohio 21, 65 N. E. 149, 93 Am. St. 636.

Cited, pp. 8, 14, 32, 34; §§ 23, 28, 37, Hughes' Proc.; §§ 33, 34, 84, 86, 88, 96, 102, 119, 263, 267, 268, Gr. & Rud.

A court has inherent power to carry forward and discharge the due administration of justice. It may administer oaths without reference to statutory prescription, and perjury may be predicated thereon. *Expressio eorum,* etc. See CONTEMPTS; APPELLATE PROCEDURE; Suth. Stat. 341.

Courts may provide a court room. Dahuke, 168 Ill. 102, 39 L. R. A. 197, n. Also essential records. 1 Freeman, Judg. 35, 37, 76; Bates. Clawson v. U. S. (1885), 185 U. S. 977. *Courts have inherent powers to carry out principal powers conferred upon them.* Statutory prescription of procedure is not always mandatory, nor is it exclusive. U. S. v. Hill (1809), 1 Brock. (U. S.) 156, No. 15,364 Fed. Cas. (Marshall), quoted and affirmed.

No act of congress provides for the practice relating to grand juries. Empanelling and maintaining them attaches to the court as a necessary incident. Kern v. Huidekoper. *Expressio eorum,* etc.; U. S. v. Hill; M'Culloch: 147; *Lex non exacte,* etc.: Kollock (code); S. v. Bolden.

Contempt; Inherent power to punish summarily. 99 Am. St. 624-676, ext. n.

If a constitution provides for courts of appellate jurisdiction only, this carries with it all necessary things for a review of errors; likewise where a court of record is created; and where a clerk is provided for, incidental things annex themselves by implication, *e. g.,* that a record shall be kept to conserve the high conserving principles of procedure or protection.

Leading Cases.—

226. C. v. BEAN (1853), 11 Cush. 414 2 Lead. C. C. (B. & H.) 172-181, ext. n., Chaplin, Crim. Cas. 465; U. S. v. Carll.

Bean stated: An indictment upon Rev. Sts. ch. 126, § 42, *for malicious destruction of glass, must aver the glass to be part of a building. An allegation that it was in a certain building is insufficient.* The statute was intended to protect buildings. Moore; Cruikshank: 21, 232.

Pleading a statutory offense; generally it is sufficient to describe it in the words of the statute. R. v. Bullock (1856), Dears. & B. C. C. 653. Mews' E. C. L., 1 Bish. Crim. Proc. 593-642. See INDICTMENT; 2 Sm. L. C. 669, 11th ed.; McClain, Crim. Law; S. v. Campbell, 29 Cruikshank; U. S. v. Simmons; U. S. v. Mills: James v. Bowman: 232; Potter v. U. S., 155 U. S. 438.

Exception. U. S. v. Carll, 105 U. S. 611 (not good after verdict), citing C. v. Bean; Cruikshank; U. S. v. Simmons, 96 U. S. 360: cases; U. S. v. Howell, 11 Wall. 432; C. v. Filburn, 119 Mass. 297; Kelly v. P., 192 Ill. 119, 85 Am. St. 823: cases; Meadowcroft v. P.; S. v. Beach (Ind.): 258; S. v. Bush, 47 Kan. 201, 13 L. R. A. 607: cases.

Every presumption is against a pleader. Bean; James; Carll; Cruikshank; Moore; Dovaston: 217.

227. C. v. HART (1853), 11 Cush. 130, 2 Lead. C. C. (B. & H.) 1-18, 1 Bish. Crim. Proc. 639, Whart. Pl. & Pr. 238, 241, Clark, Crim. Proc. *q. v. Cited,* § 280, Hughes' Proc.

Pleading of exceptions and provisos in statutes. 1 Bish. Cr. Proc. 631-639, Whart. Cr. Pl. & Pr. 238-241, Clark, Cr. Proc. 98, Bro. Max. 677-679, 2 Sm. L. C. 670, 11th ed.

Where there is an exception so incorporated with the enacting clause of a statute that the one cannot be read without the other, then the exception must be negatived. If the exception, by whatever phraseology indicated, is in a substantive clause, subsequent to the enacting clause, though it be in the same section, it is a matter of defense to be shown by the defendants. Hart; U. S. v. Cook, 17 Wall. 169, 12 Am. Law Reg. (N. S.) 682-698, n.; Gill v. Scrivens (1796), 7 Term (D. & E.), 27, 2 Lead Crim. Cas. (B. & H.) 9. *Statutes; how pleaded.* Williams v. Hingham: 7; Bean; U. S. v. Gooding: 212; Suth. Stat. 216, 221, 222, 228.

228. JORDAN v. GREENBORO FURNACE CO., 126 N. C. 143, 78 Am. St. 644-658, ext. n.

Statutes of frauds and perjuries. The statute must be pleaded in England and in states where the statute does not affect the substance of the contract. And. Steph. Pl. 228: cases; 11 Mews' E. C. L. 831.

But where the substance of the contract is affected, as in North Carolina, there advantage may be taken of the statute under the general denial. Jordan; Moody

Leading Cases.—228. Jordan.

(Tex. Civ. App.), unreported, 37 S. W. 379; stated, 78 Am. St. 656.

It may be raised under the general issue or by special plea, at the option of the defendant. Hotchkiss, 36 Vt. 593, 86 Am. Dec. 679-688, ext. n.

Certainty requires that the issue be raised at the right time and place, and in a certain way. Res adjudicata rules and conserving principles require that.

The Vermont rule is said to be the code rule. 86 Am. Dec. 687: cases. But see 78 Am. St. 648 (codes adopt common-law rule; it must be pleaded). May be raised under the general issue. May, 101 U. S. 231.

The plea of the statute is a personal plea, and may be waived generally; therefore it must be pleaded. Montgomery: 292.

One has a right to know what is waived and in a certain and definite way. Ambiguous and equivocal proceedings about such matter is opposed to the conserving principles of procedure. From the general issue one cannot determine whether or not waivable matter is waived. Kollock. Defenses resting on strict personal grounds should be pleaded; this accords with the general rule that statutory rights must be pleaded. Williams v. Hingham: 7.

On principle it seems the statute should be pleaded. The decisions in several states are very unsettled, as in New York and Colorado. 78 Am. St. 656.

It must be pleaded. Citty, 93 Tenn. 276, 42 Am. St. 919, n.: cases; stated, 78 Am. St. 652; and also that the same rule prevails in Illinois. Tarleton, 1 Gilm. 470, 41 Am. Dec. 193. May be raised under the general denial. Indiana Trust Co., 160 Ind. 647. *Cf.* 78 Am. St. 648: cases. *May be raised on demurrer, when.* Thompson, 133 Ala. 630, 93 Am. St. 49, n.

Oral contract void in Kentucky, and therefore it must be averred that the contract is in writing to sustain a judgment. Hocker, 3 Metc. (Ky.) 463; stated, 79 Am. St. 649.

A plaintiff need not aver his contract was in writing at common law. And. Steph. Pl. 228: Rule 11. It is otherwise with one defending under a statute that may be waived.

Statute of limitations need not be pleaded, 11 Mews' E. C. L. 832.

229. HARRIS v. MUSKINGUM MANUFACTURING CO. (1836), 4 Blackf. (Ind.) 267, 29 Am. Dec. 372-376, n.

Pleadings; corporate existence; essential allegation. That plaintiff is a corporation, need not be alleged, when it sues in its corporate name. Harris, Los Angeles v. Davis; Richardson; n. 33 Am. Dec. 463; Central Bank, 12 Wis. 624, 78 Am. Dec. 769, n.; Miller, 2 Idaho, 1206, 35 Am. St. 289, n.; 3 Cook, Corp. 753 (caption description insufficient); *Expressio eorum. Corporate existence must be averred.* Note, 9 Am. R. R. & Corp. Rep. 72. And is

Leading Cases.—229. Harris.

essential. Miller, *supra;* S. v. Chicago, etc. R. R., 4 S. Dak. 261, 46 Am. St. 783, n.; 5 Encyc. Pl. & Pr. 70-90: cases. Corporate existence need not be alleged. Central Bank, *supra.*

May be waived, if not demurred to. Holden, 69 Minn. 527, 65 Am. St. 585, n. Los Angeles v. Davis.

230. RICHARDSON v. ST. JOSEPH IRON CO. (1839), 5 Blackf. 146, 33 Am. Dec. 460.

Pleadings; corporate existence need not be averred. Harris: 229.

Set-off; Mutuality. Debt due the defendant and another is not a proper set-off in an action against him for his separate debt. Rose.

Practice; bill of exceptions; "all the evidence"; presumptions. Bill of exceptions must show it contains all the evidence, either direct or impliedly, else it will be presumed sufficient evidence existed. *Omnia præsumuntur rite.* Bates: 225; *Consensus;* Dovaston; Moore v. C.

Practice; new trial. Motion for must be made for waivable error. Without it only grave and incurable defects can afterward be raised as a general rule. *Consensus.* Motion for new trial essential to raise antecedent error, unless grave and incurable. *Consensus.* Brewer: 296.

231. HUNTSMAN v. S. (1882), 12 Tex. Ap. 619, 1 McClain, C. L. 609. §§ 38, 78, Hughes' Proc.; §§ 118, 137, 143, 147, 239, 268, 278, Gr. & Rud.

Limitations of legislative power; it cannot make an indictment for one thing to stand for a different thing. An indictment for larceny will not sustain a sentence for embezzlement. *Expressio unius,* etc. *Allegata et probata* must agree. It is an absurdity to charge one thing and to sentence for another.

"It is not, therefore, within the scope of legislative authority, under our constitution, to provide for the conviction of the accused for a crime which is not embraced within the allegations of the indictment on which he is tried; and it makes no difference what form the legislation for such purposes may assume, it must be void." 12 Tex. App. 635.

"It does seem certain that the indictment in this case and the verdict and judgment thereon would require much skill in false reasoning to consider them together without concluding in a *reductio ad absurdum.* And as the law reasons logically, rejecting superfluous, contradictory and incongruous things, when its solemn proceedings are made objects of ridicule by its officers or legislative enactment, the citizen should be protected by the court."

"As the record in this case does not contain any allegation, or show where the defendant ever made any answer to a charge of embezzlement, was it due process of law to proceed to judgment, convicting him for that crime before it was involved in an issue between the state and the defendant? If so, the constitutional guaranties are indeed but empty forms, idle ceremonies, and one by one the most sacred rights of freemen might all be removed, and the very ends for which society was

Leading Cases.—231. Huntsman.

organized be thwarted. If the legislature can provide for the conviction of a citizen without any charge informing him of the *nature* and *cause* of the prosecution against him in one, it can in every case, and if it can do so indirectly, it can do so directly. Affirm its right to do this, and each popular excitement may add another instance of innovation until no man will be safe in the enjoyment of life, liberty or property." 12 Tex. App. 648-649.

There shall be no departure, is a rule that is well sustained by Huntsman.

"Due process of law" defined and discussed. Its definition by Webster in the Dartmouth College Case and Murray: 219; quoted and approved. Taylor: 219*a* cited and approved. Its meaning in Pennoyer.

Allegations defining—describing—a crime, are demanded by "due process of law," by the common law, the state and the federal law. U. S. v. Mills; U. S. v. Cook, 17 Wall. 169; Cruikshank (all stated and approved).

A crime known to the laws of the land must be described, and to this jurisdiction attaches but not to anything else. As to everything else the proceedings are *coram non judice.* Moore: 21.

Jurisdictional facts cannot be presumed; they must affirmatively appear from the indictment. Rushton. Only from the indictment can jurisdictional facts appear. *De non apparentibus.* 1 Bish. C. L. 807; Cruikshank.

Without allegations there can be no relevant proof. Shutte: 291. Nor can there be a conviction. Huntsman v. S.; 1 Bish. New Crim. Proced. 418; *De non apparentibus,* etc. *Frustra probatur,* etc. Saunderson (Code).

Essential certainty necessary to give jurisdiction of subject matter, and this cannot be waived. Huntsman; Murphy, 24 Miss. 594; Moore; S. v. Thurstin; C. v. Eastman. R. v. Wheatley: 21, 22, 23. C. v. Roby: 74: cases.

Absurdities are excluded by construction. 12 Tex. Ap. 648; End. Stat. 182; Indianapolis. Bates: 223, 225.

Stare decisis disregarded where earlier decisions are contrary to fundamental rights.

Limitations of legislative power to prescribe pleading and proof. Los Angeles v. Davis; Kirby, 174 U. S. 47, 11 Am. Cr. Rep. 330-383, ext. n.; Moore: 21; Dovaston: 217; S. v. Couch, 54 S. C. 286, 32 S. C. 408, 11 Am. Cr. Rep. 346 ("divers other persons" not permissible). S. v. Thomas; S. v. Beach: 257, 258.

232. U. S. v. CRUIKSHANK (1875), 92 U. S. 542 (23 L. ed. 588); McClain, Const. Cas. 31, Boyd, Cas. Const. Law, Tucker, Const. *q. v.;* Hare, Am. Const. Law, 124 U. S. 487, Cool. Const. Lim.; Pom. Const. Law, Black, Const. Law.

Cited, pp. 6, 9, 11, 12, 17, 26; §§ 1, 4, 5-8, 10, 12, 21, 23, 28-31, 38, 44, 49, 51, 52, 72, 73, 78, 79, 80, 82, 104, 120, 144, 156, 187, 190, 204, 244, 245, Hughes' Proc.

Cited, §§ 1, 33, 60, 80, 88, 93, 96, 102, 108, 109, 112, 118, 119, 122-124, 142, 144,

Leading Cases.—232. Cruikshank.

148, 163, 164, 198, 200, 201*a*, 202-204, 214, 223, 225, 232, 237, 238, 239, 246, 248, 261, 263, 267, 268, 270, 276-78, 292-294, 297, Gr. & Rud.

[U. S. v. Cruikshank, because of its importance in procedure, construction and well expressed views of the polity of the federal government, is reported here in full. It is a case of intensive application and stands to support the claim for a prescription constitution. It should be connectedly considered with Windsor: 1, and the maxims and cases appended hereto.]

"1. Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of government for the promotion of their general welfare and the protection of their individual as well as their collective rights. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

"2. There is in our political system a government of each of the several states, and a government of the United States. Each is distinct from the others, and has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state; but his rights of citizenship under one of these governments will be different from those he has under the other.

"3. The government of the United States, although it is, within the scope of its powers, supreme and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the states.

"4. The right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the state to afford it protection, existed long before the adoption of the constitution. The first amendment to the constitution, prohibiting congress from abridging the right to assemble and petition, was not intended to limit the action of the state governments in respect to their own citizens, but to operate upon the national government alone. It left the authority of the states unimpaired, added nothing to the already existing powers of the United States, and guaranteed the continuance of the right only against congressional interference. The people, for their protection in the enjoyment of it, look to the states, where the power for that purpose was originally placed.

"5. The right of the people peaceably to assemble, for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States.

"6. The right to bear arms is not granted by the constitution; neither is it in any manner dependent upon that instrument for its existence. The second amendment means no more than that it shall not be infringed by congress, and has no other effect than to restrict the powers of the national government.

"7. Sovereignty, for the protection of the rights, life and personal liberty within the respective states, rests alone with the states.

"8. The fourteenth amendment prohibits a state from depriving any person of life, liberty or property, without due process of law, and from denying to (p. 543) any person within its jurisdiction the equal protection of the laws; but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guarantee against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all of its citizens in the enjoyment of an equality of rights was originally assumed by the state, and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

"9. In *Minor v. Happersett*, 12 Wall. 178, this court decided that the constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states. In *United States v. Reese* et al., *supra*, p. 214, it held that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States, but the last has been.

"10. The counts of an indictment which charge the defendants with having banded and conspired to injure, oppress, threaten, and intimidate citizens of the United States, of African descent, therein named; and which in substance respectively allege that the defendants intended thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them in common with other good citizens by the constitution and laws of the United States; to hinder and prevent them in the free exercise of the right peacefully to assemble for lawful purposes; prevent and hinder them from bearing arms for lawful purposes; derive them of their respective several lives and liberty of person without due process of law; prevent and hinder them in the free exercise and enjoyment of their several right to the full and equal benefit of the law; prevent and hinder them in the free exercise and enjoyment of their several and respective right to vote at any election to be thereafter by law had and held by the people of the state of Louisiana, or to put them in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted at an election theretofore had

Leading Cases.—232. Cruikshank.

and held according to law by the people of said State—do not present a case within the sixth section of the Enforcement Act of May 31, 1870 (16 Stat. 141). To bring a case within the operation of that statute, it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the alleged offense is not indictable under any act of congress.

Allegations must present essential facts:

"11. The counts of an indictment which, in general language, charge the defendants with an intent to hinder and prevent citizens of the United States, of African descent, therein named, in the free exercise and enjoyment of the rights, privileges and immunities, and protection, granted and secured to them (p. 544) respectively as citizens of the United States, and of the State of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States, do not specify any particular right and enjoyment of which the conspirators intended to hinder or prevent, and too vague and general, lack the certainty and precision required by the established rules of criminal pleading, and are therefore not good and sufficient in law.

"12. *In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.'* The indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offense, whether it be at common law or by statute, includes general terms; it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species,—it must descend to particulars. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

"13. By the act under which this indictment was found, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court. The indictment should therefore, state the particulars to inform the court as well as the accused. It must appear from the indictment that the acts charged will, if proved, support a conviction for the offense alleged.

Mr. Chief Justice Waite delivered the opinion of the court (p. 548):

"This case comes here with a certificate by the judges of the Circuit court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon section 6 of the Enforcement Act of May 31, 1870. That section is as follows:

"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such person shall be held guilty of felony and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit or trust created by the constitution or laws of the United States: 16 Stat. 141.

"The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether 'the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States.'

"The general charge in the first eight counts is that of 'banding,' and in the second eight, that of 'conspiring' together to injure, oppress, threaten and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges 'granted and secured' to them 'in common with all other good citizens of the United States by the constitution and laws of the United States.'

"The offenses provided for by the statute in question do not consist in the mere 'banding' or 'conspiring' of two or (p. 549) more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of congress.

"We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose

Leading Cases.—232. Cruikshank.

rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter House Cases,* 16 Wall. 74 (83 L. ed. 408).

"Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

"Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate states, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations or for their complete protection as citizens of the confederated states. For this reason, the people of the United States, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for (p. 550) the common defense, promote the general welfare, and secure the blessings of liberty' to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.

"The government thus established and defined is to some extent a government of the states in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

"The people of the United States resident within any state are subject to two governments: one state and the other national; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and

Leading Cases.—232. Cruikshank.

abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the state: the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship (p. 551) which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

"The government of the United States is one of delegated powers alone. Its authority is defined and limited by the constitution. All powers not granted to it by that instrument are reserved to the states or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states.

"We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States.

"The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their 'lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.' The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the constitution. The government of the United States when established found it in existence, with the obligation on the part of the states to afford it protection. As no direct power over it was granted to congress, it remains, according to the

Leading Cases.—232. Cruikshank.

ruling in Gibbons v. Ogden, *id.* 203, subject to state jurisdiction. (p. 552). Only such existing rights were committed by the people to the protection of congress as came within the general scope of the authority granted to the national government.

"The first amendment to the constitution prohibits congress from abridging the 'right of the people to assemble and to petition the government for a redress of grievances.' This, like other amendments proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the national government alone. Barron v. The City of Baltimore, 7 Pet. 250; Lessee of Livingston v. Moore, *id.* 551; Fox v. Ohio, 5 How. 434; Smith v. Maryland, 18 *id.* 76; Withers v. Buckley, 20 *id.* 90 (15 L. ed. 819); Pervear v. The Commonwealth, 5 Wall. 479 (18 L. ed. 609); Twitchell v. The Commonwealth, 7 *id.* 321 (19 L. ed. 223); Edwards v. Elliott, 21 *id.* 557 (22 L. ed. 492). It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in Twitchell v. The Commonwealth, 7 Wall. 325 (19 L. ed. 223), 'the scope and application of these amendments are no longer subjects of discussion here.' They left the authority of the states just where they found it, and added nothing to the already existing powers of the United States.

"The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the states. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

"The right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in (p. 553) these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offense, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

"The second and tenth counts are equally defective. The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in the City of New York v. Miln, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police, 'not surrendered or restrained' by the constitution of the United States.

"The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the state of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the states, when they entered into the Union under the constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy (p. 554) to falsely imprison or murder within a state, than it would be to punish for false imprisonment or murder itself.

"The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheat. 244, it secures the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

"The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in 'the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said state of Louisiana and by the United States; and then and there, at that time, being in force in the said state and district of Louisiana aforesaid, for the security of their respective

persons and property, then and there, at that time enjoyed at and within said state and district of Louisiana by white persons, being citizens of said state of Louisiana and the United States, for the protection of the persons and property of said white citizens.' There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the state of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

"The fourteenth amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything (p. 555) to the rights which one citizen has under the constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. The duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

"No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

"Another objection is made to these counts, that they are too vague and uncertain. This will be considered hereafter, in connection with the same objection to other counts.

"The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored, 'in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be hereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid.' In Minor v. Happersett, 21 Wall. 178 (22 L. ed. 631), we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In United States v. Reese et al., *supra*, p. 214, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is

Leading Cases.—232. Cruikshank.

not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on (p. 556) account of race, etc., is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States; but the last has been.

"Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance. (*Verba fortius.*)

"The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted 'at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to-wit, on the fourth day of November, A. D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law.' There is nothing to show that the elections voted at were any other than state elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a state. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the states. If a state cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the constitution (art. 4, sec. 4); but it applies to no case like this.

"We are therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth. (p. 557) and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the constitution. (*Actus non facit.*)

"We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is 'to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively

Leading Cases.—232. Cruikshank.

as citizens of the United States, and as citizens of said state of Louisiana'; 'for the reason that they. . . . being then and there citizens of said state and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof,' and in the eighth and sixteenth, to hinder and prevent them 'in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States.' The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

"According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offense in the language of the statute, but whether the offense has here been described at all. The statute provides for the punishment of those who conspire 'to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.' These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every, each, all, and singular' the rights granted them by the constitution, etc. There is no specification of any particular right. The language is broad enough to cover all.

"In criminal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed (p. 558) of the nature and cause of the accusation.' Amend. VI. In United States v. Mills, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in United States v. Cook, 17 Wall. 174 (21 L. ed. 539), that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time and circumstances. (*Actus.*)

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty

Leading Cases.—232. Cruikshank.

the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some states a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court (p. 559) may see that they are in fact illegal. S. v. Parker, 43 N. H. 83; S. v. Keach, 40 Vt. 118; Alderman v. P., 4 Mich. 414, 69 Am. Dec. 321; S. v. Roberts, 34 Me. 32. In Maine, it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the state prison (S. v. Roberts); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the state prison.' All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here the crime is made to assist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged.

"But it is needless to pursue the argument further. The conclusion is irresistible that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them. (Campbell: 2; Slacum; Moore: 21.)

The order of the circuit court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants." 92 U. S. 542-559 (23 L. ed. 588).

Mr. Justice Clifford, dissenting:

"I concur that the judgment in this case should be arrested, but for reasons quite

Leading Cases.—232. Cruikshank.

different from those given by the court." (P. 560)

"Power is vested in congress to enforce by appropriate legislation the prohibition contained in the fourteenth amendment of the constitution; and the fifth section of the Enforcement Act provides to the effect that persons who prevent, hinder, control, or intimidate, or who attempt to prevent, hinder, control, or intimidate, any person to whom the right of suffrage is secured or guaranteed by that amendment, from exercising or in exercising such right, by means of bribery or threats; of depriving such person of employment or occupation; or of ejecting such person from rented house, lands or other property; or by threats of refusing to renew leases or contracts for labor; or by threats of violence to himself or family,—such person so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined or imprisoned, or both, as therein provided. 16 Stat. 141.

"Provision is also made, by section 6 of the same act, that, if two or more persons shall band or conspire together, or go in disguise, upon the public highway, or upon the premises of another, with intent to violate any provision of that act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution and laws of the United States, or because of his having exercised the same, such persons shall be deemed guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, and be further punished as therein provided.

"More than one hundred persons were jointly indicted at the April term, 1873, of the circuit court of the United States for the district of Louisiana, charged with offenses in violation of the provisions of the Enforcement Act. By the record, it appears that the indictment contained thirty-two counts, in two series of sixteen counts each; that the first series were drawn under the fifth and sixth sections of the act; and that the second series were drawn under the seventh section of the same act; and that the latter series charged that the prisoners are guilty of murder committed by them in the act of violating some of the provisions of the two preceding sections of that act.

"Eight of the persons named in the indictment appeared on (p. 561) the 10th of June, 1874, and went to trial under the plea of not guilty, previously entered at the time of their arraignment. Three of those who went to trial—to-wit, the three defendants named in the transcript—were found guilty by the jury on the first series of the counts of the indictment, and not guilty on the second series of the counts in the same indictment.

"Subsequently the convicted defendants filed a motion for a new trial, which motion being overruled they filed a motion in arrest of judgment. Hearing was had upon that motion; and the opinions of the judges of the circuit court being opposed, the matter in difference was duly certified to this court, the question being whether the motion in arrest of judgment ought to be granted or denied.

Leading Cases.—232. Cruikshank.

"Two only of the causes of arrest assigned in the motion will be considered in answering the questions certified: (1) Because the matters and things set forth and charged in the several counts in question do not constitute offenses against the laws of the United States, and do not come within the purview, true intent, and meaning of the Enforcement Act. (2) Because the several counts of the indictment in question are too vague, insufficient, and uncertain to afford the accused proper notice to plead and prepare their defense, and do not set forth any offense defined by the Enforcement Act.

"Four other causes of arrest were assigned; but, in the view taken of the case, it will be sufficient to examine the two causes above set forth.

"Since the questions were certified into this court, the parties have been fully heard in respect to all the questions presented for decision in the transcript. Questions not pressed at the argument will not be considered; and, inasmuch as the counsel in behalf of the United States, confined their arguments entirely to the thirteenth, fourteenth, and sixteenth counts of the first series in the indictment, the answers may well be limited to these counts, the others being virtually abandoned. Mere introductory allegations will be omitted as unimportant, for the reason that the questions to be answered relate to the allegations of the respective counts describing the offense.

"As described in the thirteenth count, the charge is, that the (p. 562) defendants did, at the time and place mentioned, combine, conspire, and confederate together, between and among themselves, for and with the unlawful and felonious intent and purpose one Levi Nelson and one Alexander Tillman, each of whom being then and there a citizen of the United States, of African descent, and a person of color, unlawfully and feloniously to injure, oppress, threaten, and intimidate, with the unlawful and felonious intent thereby the said persons of color, respectively, then and there to hinder and prevent in their respective and several free exercise and enjoyment of the rights, privileges, and immunities, and protection, granted and secured to them respectively as citizens of the United States and citizens of the state, by reason of their race and color; and because that they, the said persons of color, being then and there citizens of the state and of the United States, were then and there persons of African descent and race, and persons of color, and not white citizens thereof, the same being a right or privilege granted or secured to the said persons of color respectively in common with all other good citizens of the United States, by the federal constitution and the laws of congress.

"Matters of law conceded, in the opinion of the court, may be assumed to be correct without argument; and, if so, then discussion is not necessary to show that every ingredient of which an offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error.

Leading Cases.—232. Cruikshank.

United States v. Cook, 17 Wall. 174 (21 L. ed. 539).

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment; and, if the offense cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed, so as to bring the accused within the true intent and meaning of the statute defining the offense. Authorities of great weight, besides those referred to by me, in the dissenting opinion just read (p. 563), may be read in support of that proposition. 2 East. P. C. 1124; Dord v. People, 9 Barb. 675; Ike v. State, 23 Miss. 525; State v. Eldridge, 7 Eng. 608.

"Every offense consists of certain acts done or omitted under certain circumstances; and in the indictment for the offense, it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth. Arch. Cr. Pl., 15th ed., 43.

"Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens thereof, and the fourteenth amendment also provides, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Congress may, doubtless, prohibit any violation of that provision, and may provide that any person convicted of violating the same shall be guilty of an offense, and be subject to such reasonable punishment as congress may prescribe.

"Conspiracies of the kind described in the introductory clause of the sixth section of the Enforcement Act are explicitly forbidden by the subsequent clauses of the same section; and it may be that if the indictment was for a conspiracy at common law, and was pending in a tribunal having jurisdiction of common-law offenses, the indictment in its present form might be sufficient, even though it contains no definite allegation whatever of any particular overt act committed by the defendants in pursuance of the alleged conspiracy.

"Decided cases may doubtless be found in which it is held that an indictment for a conspiracy, at common law, may be sustained where there is an unlawful agreement between two or more persons to do an unlawful act or do a lawful act by unlawful means; and authorities may be referred to which support the proposition, that the indictment, if the conspiracy is well pleaded, is sufficient, even though it be not alleged that any overt act had been done in pursuance of the unlawful combination.

"Suffice it to say, however, that the authorities to that effect are opposed by another class of authorities equally respectable, and even more numerous, which decide that the indictment is (p. 564) bad unless it is alleged that some overt act was committed in pursuance of the intent and purpose of the alleged conspiracy; and in

Leading Cases.—232. Cruikshank.

all the latter class of cases it is held, that the overt act, as well as the unlawful combination, must be clearly and accurately alleged.

"Two reasons of a conclusive nature, however, may be assigned which show, beyond all doubt, that it is not necessary to enter into the inquiry which class of those decisions is correct.

"1. Because the common law *is not a source of jurisdiction* in the circuit courts, nor in any other federal court.

"Circuit courts have no common-law jurisdiction of offenses of any grade or description; and it is equally clear that the appellate jurisdiction of the supreme court does not extend to any case or any question, in a case not within the jurisdiction of the subordinate federal courts. State v. Wheeling Bridge Co., 13 How. 563; United States v. Hudson et al., 7 Cranch, 32.

"2. Because it is conceded that the offense described in the indictment is an offense created and defined by an act of congress.

"Indictments for offenses created and defined by statute must in all cases follow the words of the statute; and, where there is no departure from that rule, the indictment is in general sufficient, except in cases where the statute is elliptical, or where, by necessary implication, other constituents are component parts of the offense: as where the words of the statute defining the offense have a compound signification, or are enlarged by what immediatly precedes or follows the words describing the offense, and in the same connection. Cases of the kind do arise, as where, in the dissenting opinion in United States v. Reese et al., *supra*, p. 222, it was held, that the words *offer to pay a capitation tax* were so expanded by a succeeding clause of the same sentence that the word 'offer' necessarily included readiness to perform what was offered, the provision being that the offer should be equivalent to actual performance if the offer failed to be carried into execution by the wrongful act or omission of the party to whom the offer was made.

"Two offenses are in fact created and defined by the eighth section of the Enforcement Act, both of which consist of a (p. 565) conspiracy with an intent to perpetrate a forbidden act. They are alike in respect to the conspiracy; but differ very widely in respect to the act embraced in the prohibition.

"1. Persons, two or more, are forbidden to band or conspire together, or go in disguise upon the public highway, or on the premises of another, *with intent to violate* any provision of the Enforcement Act, which is an act of twenty-three sections.

"Much discussion of that clause is certainly unnecessary, as no one of the counts under consideration is founded on it, or contains any allegations describing such an offense. Such a conspiracy with intent to injure, oppress, threaten, or intimidate any person, is also forbidden by the succeeding clause of that section, if it be done with intent to prevent or hinder his free exercise and enjoyment of *any right or privilege* granted or secured to him by the constitution or laws of the United States, or because of having exercised the same. Sufficient appears in the thirteenth

count to warrant the conclusion, that the grand jury intended to charge the defendants with the second offense created and defined in the sixth section of the Enforcement Act.

"Indefinite and vague as the description of the offense there defined is, it is obvious that it is greatly more so as described in the allegations of the thirteenth count. By the act of congress the prohibition is extended to any *right or privilege* granted or secured by the constitution or laws of congress; leaving it to the pleader to specify the particular right or privilege which had been invaded, in order to give the accusation that certainty which the rules of criminal pleading everywhere require in an indictment; but the pleader in this case, overlooking any necessity for any such specification, and making no attempt to comply with the rules of criminal pleading in that regard, describes the supposed offense in terms much more vague and indefinite than those employed in the act of congress.

"Instead of specifying the particular right or privilege which had been invaded, the pleader proceeds to allege that the defendants, with all the others named in the indictment, did combine, conspire and confederate together with the unlawful intent and purpose the said persons of African descent and (p. 566) persons of color then and there to injure, oppress, threaten and intimidate, and thereby then and there to hinder and prevent them in the free exercise and enjoyment of the rights, *privileges and immunities and protection* granted and secured to them as citizens of the United States and citizens of the state without any other specification of the rights, privileges, immunities and protection which had been violated or invaded, or which were threatened except what follows; to-wit, the same being a right or privilege granted or secured in common with all other good citizens by the constitution and laws of the United States.

"Vague and indefinite allegations of the kind are not sufficient to inform the accused in a criminal prosecution of the nature and cause of the accusation against him, within the meaning of the sixth amendment of the constitution.

"Valuable rights and privileges, almost without number are granted and secured to citizens by the constitution and laws of congress; none of which may be with impunity, invaded in violation of the prohibition contained in that section. Congress intended by that provision to protect citizens in the enjoyment of all such rights and privileges; but in affording such protection in the mode there provided congress never intended to open the door to the invasion of the rule requiring certainty in criminal pleading, which for ages has been regarded as one of the great safeguards of the citizen against oppressive and groundless prosecutions.

"Judge Story says the indictment must charge the time and place and nature and circumstances of the offense with clearness and certainty, so that the party may have full notice of the charge, and be able to make his defense with all reasonable knowledge and ability. 2 Story Const., § 1785.

"Nothing need be added to show that the

Leading Cases.—232. Cruikshank.

fourteenth count is founded upon the same clause in the sixth section of the Enforcement Act as the thirteenth count, which will supersede the necessity of any extended remarks to explain the nature and character of the offense there created and defined. Enough has already been remarked to show that that particular clause was passed to protect citizens in the free exercise and enjoyment of every right or privilege granted (p. 567) or secured to them by the constitution and laws of congress, and to provide for the punishment of those who band or conspire together, in the manner described, to injure, oppress or intimidate any citizen, to prevent or hinder him from the free exercise and enjoyment of all such right or privilege, or because of his having exercised any such right or privilege so granted or secured.

"What is charged in the fourteenth count is, that the defendants did combine, conspire, and confederate the said citizens of African descent and persons of color to injure, oppress, threaten and intimidate, with intent the said citizens thereby to prevent and hinder in the free exercise and enjoyment of the right and privilege to vote at *any election to be thereafter had and held* according to law by the people of the state, or by the people of the parish; they, the defendants, well knowing that the said citizens were lawfully qualified to vote at any such election thereafter to be had and held.

"Confessedly, some of the defects existing in the preceding count are avoided in the count in question; as, for example, the description of the particular right or privilege of the said citizens which it was the intent of the defendants to invade is clearly alleged: but the difficulty in the count is, that it does not allege for what purpose the election or elections were to be ordered, nor when and where the elections were to be had and held. All that is alleged upon the subject is, that it was the intent of the defendants to prevent and hinder the said citizens of African descent and persons of color in the free exercise and enjoyment of the right and privilege to vote *at any election thereafter to be had and held*, according to law, by the people of the State, or by the people of the parish, without any other allegation whatever as to the purpose of the election, or any allegation as to the time and place when and where the election was to be had and held.

"Elections thereafter to be held must mean something different from pending elections; but whether the pleader means to charge the intent and purpose of the alleged conspiracy extended *only* to the next succeeding election to be held in the state or parish, or to all future elections to be held in the state or parish during the lifetime of the parties, may admit of (p. 568) a serious question, which cannot be easily solved by any thing contained in the allegations of the count.

"Reasonable certainty, all will agree, is required in criminal pleading; and if so it must be conceded, we think, that the allegation in question fails to comply with the requirement. Accused persons, as matter of common justice, ought to have the charge against them set forth in such

Leading Cases.—232. Cruikshank.

terms that they may readily understand the nature and character of the accusation in order that they, when arraigned, may know what answer to make to it, and that they may not be embarrassed in conducting their defense; and the charge ought also to be laid in such terms that, if the party accused is put to trial, the verdict and judgment may be pleaded in bar of a second accusation for the same offense.

"Tested by these considerations, it is quite clear that the fourteenth count is not sufficient to warrant the conviction and sentence of the accused.

"Defects and imperfections of the same kind as those pointed out in the thirteenth count also exist in the sixteenth count, and of a more decided character in the latter count than in the former; conclusive proof of which will appear by a brief examination of a few of the most material allegations of the charge against the defendants. Suffice it to say, without entering into details, that the introductory allegations of the count are in all respects the same as in the thirteenth and fourteenth counts. None of the introductory allegations allege that any overt act was perpetrated in pursuance of the alleged conspiracy; but the jurors proceed to present that the unlawful and felonious intent and purpose of the defendants were to prevent and hinder the said citizens of African descent and persons of color, by the means therein described, in the free exercise and enjoyment *of each, every, all, and singular the several rights and privileges* granted and secured to them by the constitution and laws of the United States in common with all other good citizens, without any attempt to describe or designate any particular right or privilege which it was the purpose and intent of the defendants to invade, abridge or deny.

"Descriptive allegations in criminal pleading are required to be reasonably definite and certain, as a necessary safeguard (p. 569) to the accused against surprise, misconception, and error in conducting his defense, and in order that the judgment in the case may be a bar to a second accusation for the same charge. Considerations of the kind are entitled to respect; but it is obvious, that if such a description of the ingredient of the offense created and defined by an act of congress is held to be sufficient, the indictment must become a *snare* to the accused: as it is scarcely possible that an allegation can be framed which would be less certain, or more at variance with the universal rule that every ingredient of the offense must be clearly and accurately described so as to bring the defendant within the true intent and meaning of the provision defining the offense. Such a vague and indefinite description of a material ingredient of the offense is not a compliance with the rules of pleading in framing an indictment. On the contrary, such an indictment is insufficient, and must be held bad on demurrer or in arrest of judgment.

"Certain other causes for arresting the judgment are assigned in the record, which deny the constitutionality of the Enforcement Act; but having come to the conclusion that the indictment is insufficient, it is not necessary to consider that question." 92 U. S. 559-569 (23 L. ed. 594-597).

U. S. v. Cruikshank involves several of the most important principles of procedure. It reaffirms the leading rule in R. v. Wheatley: 19, and Rushton: 5—the statement of claim shall define a wrong known to the laws of the land. From those cases, and in relation to the rule they bear, this case should be carefully considered. See ALLEGATIONS; Continental Ins. Co. v. Rhoads. Slacum; Bowman v. P.; 2 Cent. Dig. APP. & ERROR. § 1223; 2 Cyc. 691, 715.

No case better presents the rule that the pleading shall state "a cause of action"—describe a wrong. The motion in arrest was represented by able lawyers, among whom was David Dudley Field, the author of the New York Code of Civil procedure, with which this motion in arrest was consistent, because that Code provides that the complaint shall contain a statement of the facts constituting a cause of action in ordinary and concise language and without unnecessary repetition.

U. S. v. Mills and U. S. v. Cook, widely cited cases to the point that an indictment must be certain and contain regular allegations of fact, are stated and explained. Huntsman.

There must be regular allegations, is the fourth requirement of "due process of law," as defined in Murray: 219. The foregoing cases discuss that element and indispensable requirement in "due process of law." Huntsman; Moore: 21.

The motion in arrest depended upon the rule, every presumption is against a pleader, as it was applied in *Dovaston:* 217; *Green:* 90, and in *Kewaunee:* 29; *Harvey v. Brydges* and *Hanford:* 86. In relation to this the court observed:

"We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance." 92 U. S. 556.

Resort cannot be had to judicial knowledge to raise controversies not raised by the pleadings. 180 U. S. 480, n.: cases; *id.* 533. See *Dictum.*

The above quotation expresses a rule that is applied to all records, civil or criminal, and from all courts, superior or inferior. Jurisdictional facts are not presumed. *Ransom:* 122; *Hannah:* 128; *Rushton:* 5; *Hanford:* 86; *Borkenhagen;* Sto. Pl. 10. Bowman v. P.. Slacum; 2 Cyc. 689-691 (conflicting cases); Moore: 21: cases.

Jurisdictional facts must affirmatively appear in a record; "regular allegations" must present these. Murray: 219. In an indict-

Leading Cases.—232. Cruikshank.

ment they must appear in black upon white, and within its four corners; they cannot be inferred and argued in, they must be tangible and plainly appear with certainty. They cannot depend upon suspicion or conjecture. *De non apparentibus.* If omitted the defect is one of substance and cannot be waived; a sentence without them is vulnerable to a motion in arrest of judgment, and of course collateral attack.

The indictment is the foundation of a criminal prosecution, and if it is bad in substance the sentence fails. *Debile fundamentum fallit opus; Frustra probatur quod probatum non relevat.*

Conclusions of law are insufficient—they are nullities. This rule is applied in a very clear and instructive way. For this rule the case should be studied and well remembered. J'Anson: 91; Green: 90; Moore: 21; Hopper: 4; Mallinckrodt: 12*b*. See ALLEGATIONS; CONCLUSIONS; CAUSE OF ACTION; IDENTIFICATION.

Expressio unius est exclusio alterius is well illustrated in reference to the enumerated powers of the federal government (p. 549, 92 U. S.), and also with respect to the necessity of description of one certain crime (pp. 556-559, 92 U. S.).

The polity of the federal government, and its relation to the state governments is clearly presented. The Slaughter House Cases is quoted from, and also other notable and leading federal cases, such as *Gibbons* and *New York v. Miln.* See also *Collector v. Day:* 148. Cruikshank was much considered in U. S. v. Hodges, 203 U. S. 1. In this case a conspiracy against negroes with proper averments failed. This far Cruikshank was denied. See James: 233; Hanford: 86; Burks: 217*a*.

Statutory crimes must be charged in language beyond the words of the statute, if necessary to describe the elements of a crime. Act and intent are essential to constitute crime, and each of these elements must be averred. *Actus non facit reum nisi mens sit rea.* In this case the intent is not charged. Generally it is sufficient to charge a crime in the language of the statute. C. v. Bean: *cases:* 226.

General allegations are insufficient. From such, courts will not carve out a crime to fit the evidence after its admission. James: 233. One has the right to know the specific crime he is charged with, and if he cannot determine this, the allegations are nullities and cannot be waived or cured or aided. They are fatal to any and all attacks—to motions in arrest of judgment. McAllister; Hopper. They are no authority for receiving evidence. Pleadings are to limit issues and to narrow proofs; Kollock; Gay: 138; Shutte: 291. *Frustra probatur.*

Omne majus continet in se minus is not applied to establish particular and necessary allegations from sweeping general state-

Leading Cases.—232. Cruikshank.

ments, out of which almost any kind of an offense could be carved and established by the ingenuity of counsel, before a loose and uncertain court which had no comprehension of a certain and definite theory of procedure. *De non apparentibus,* etc. A certain crime must be charged and it must be proved as laid. Bristow: 135. *Actore,* etc.

A case may be too broadly stated. Cruikshank, and so, too, of dilatory matter. Kraner: 299.

A conspiracy may be provided for without reference to any specific act, but if the latter is provided for, then it must be averred as descriptive of the offense. Williams: 7; Bartlett; Russell v. Mann; Haddock; Andrews; Tyler v. Pomeroy; Virginia Coupon Cases.

That a study of procedure is a study of government is well illustrated in U. S. v. Cruikshank. For this view it deserves especial attention.

The uses of the indictment to apprise the defendant of the charge and of the court is reiterated with the usual emphasis; there was also reference to its use for *res adjudicata* (former jeopardy) purposes. The case also shows the importance of the record to enable the appellate court to review the precise points that were viewed and considered by the trial court.

Accusatory governments must respect the principle in Cruikshank. Governments that proceed without allegations and proofs are inquisitorial, and are absolute or savage or barbarous. These are not protecting. See Windsor: 1; J'Anson: 81; Lange: 159; Dovaston: 217.

Courts are bound by their records wherever the points assigned and the record involved is presented and discussed, as in *Cruikshank.* About this the case is a model that might be well followed in appellate procedure. Wherever records are disposed of by sweeping conclusions and palpable disregard is shown the matter presented, courts do not consider they are bound by their records.

Indictments must be certain, to inform the defendant of what he stands charged. 2 Sto. Const., § 1785. And for other purposes. Sto. Pl. 10; R. v. Goldsmith: 20; *sub,* Rosen: 92; Guedel: 74*a*.

Statements to found a judgment on must be certain.. Huntsman; Beaumont: 367; Moore, 43 Or. 243, 99 Am. St. 724 (Code); Saunderson (Code).

232a. DOBSON v. CAMPBELL (1833), 1 Sumner, 319: Cases, 1 Robt. Pat. 681, 7 Fed. cases 783; And. Steph. Pl. 230: Cases, with Jackson v. Pesked, 1 M. & S. 237 (1 Chit. Pl. 705, 714); also notes 1 Saunders, R. 228 (same rule as R. v. Goldsmith: 20), also Spieres v. Parker 1 T. R. 145 (Rushton: 5), and Smith v. U. S. 1 Gall. 267. 1 Chit. Pl. 705-716. From all, the rule is gathered and stated: "If the declaration upon an assignment of a

Leading Cases.—232a. Dobson.

patentright omits to state that the assignment has been duly recorded in the state department, the defect is cured by a verdict for the plaintiff.

"Where a fact must necessarily have been proved at the trial to justify the verdict, and the declaration omits to state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof." *Omne majus continet in se minus:* 70-83, 105 Mo. Ap. 567 (rule in Dobson stated).

In *Jackson* Ellenborough said: "When a matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, then the want of stating that matter in express terms in the declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict."

Smith:—"It is a general rule that, wheresoever it may be presumed that anything must of necessity be given in evidence, the want of mentioning it in the record, will not vitiate it after a verdict."

It will not be assumed that the trial court acted absurdly, or without authority, if by intendment, a different construction can be given the record. *Interest reipublicæ,* etc.; *Ut res magis valeat quam pereat.* 1 Gr. Ev. 19; Bro. Max. 182, 602, Moore; Waverton; Waters: 21, 70, 71; R. v. Goldsmith: 20. Young, 105 Mo. Ap. 563 (liberal). Robinson, *id.* 567. See ALLEGATIONS.

233. JAMES v. BOWMAN (1903), 190 U. S. 127. *Cited,* § 246, Gr. & Rud.

The same rule applies in fraud also in civil cases. Fish v. Cleland; *Frustra probatur,* etc.

James stated: Bowman was convicted in a federal court for bribing negro voters, in Kentucky. The conviction rested on § 5507 R. S. U. S., which was a *general* provision against bribery at all elections, both state and federal. The statute rested on the XVth Amendment of the Constitution of the United States: "§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." "§ 2. The congress shall have power to enforce this article by appropriate legislation."

B. raised the question of the statute (§ 5507) by *habeas corpus,* and was released, according to *Lackey,* 46 C. C. A. 189, 107 Fed. 114.

The government appealed. Its contention was: 1. That the statute was to protect federal elections under the broad power of protecting its own existence. (M'Culloch: 147; Logan: 249.) 2. That a statute may be valid in part and void in part. (Spraigue.)

It was not alleged that any state agency was violating the law, nor was it averred that the voters were bribed on account of race, color or previous condition of servitude. In substance, such were the leading features of the record. Cruikshank.

The court held the statute was unconstitutional because it was too broad; that where the manifest intent of the lawmaker is to include things that are unconstitutional, the courts will not judicially legislate and carve out of such broad, sweeping statutes what they may consider valid. This statute was void *in toto.* U. S. v. Reese, 92 U. S. 214; Trade Mark Cases, 100 U. S. 82 (quoted in 190 U. S. 140-142); *Cujus est instituere.*

A statute may be void for uncertainty. Suth. Stat. 86, 410, 411; Augustine, 41 Tex. Cr. R. 59, 96 Am. St. 765; Burks v. Bosso: 217*a*.

Omission of the allegation that a state agency was violating the law was fatal to the indictment. It is insufficient to aver that Bowman and others, as individuals, had committed the wrong. The XIVth and XVth amendments interdict state oppression, not that committed by individuals upon their own account. Cruikshank (an indictment must be specific and certain. Huntsman: 231).

Under those amendments the indictment must show a wrong committed by a state agency. U. S. v. Harris (1883), 106 U. S. 629, 639 (quoted in 190 U. S. 138). And the particulars—the means—of its commission. Essential facts must appear to uphold the sentence. Haddock.

A statement of the wrong must disclose with certainty a wrongdoer within federal jurisdiction. Cruikshank; James. *De non apparentibus,* etc.

This case well illustrates the importance of construction to the practitioner. He must also know the polity of the federal government as expounded in *M'Culloch, Cohens, Martin, Tarble's Case, Cruikshank* and *James.* In this connection it may be well to call attention to technical distinctions so often introduced by the federal court, as in *U. S. v. Lee, sub, Belknap v. Schild* (U. S. officers may be sued, but the government cannot be). See also *Rosen:* 92 (obscene matter cannot be pleaded when relevant).

Federal and state statutes. Sovereignty in America is divided, qualified and complicated; it is distributed among federal and state agencies—the federal and the state governments. Congress has a legislative power only in respect to certain subjects enumerated in the federal constitution. The state legislatures have a general legislative power within the several states. These are limited by state constitutions and also further diminished and qualified by the supreme laws of the land (Art. VI. Const. of the United States), which comprise all that is granted the federal government for its enumerated purposes. For these the powers of the federal government are supreme, and they cannot be disparaged or denied by state power; and this in turn in its rightful

Leading Cases.—233. James.

Leading Cases.—233. James.

domain is equally supreme and cannot be abrogated or obstructed by federal power. Ableman; Cohens; Martin; Tarble's; Cruikshank; James, Cool. Const. Lim. 7-27; Donnell, 48 Miss. 661, 12 Am. Rep. 375 (constitutional amendments, 13, 14, 15, U. S., discussed and Civil Rights Act in Mississippi upheld); Suth. Stat. Construct. 21: cases.

The theory of the federal and the state governments must be familiar to a practitioner. Haddock. A study of the foregoing cases will best impress that fact, and also that the study of procedure is a study of government. *Cf.* James with U. S. v. Hodges, 203 U. S. 1.

234. R. v. ROWLANDS (1851), 17 Q. B., A. & E. (N. S.) 671, 79 E. C. L. R., 2 Den. C. C. 364, 5 Cox, C. C. 466; cited and approved in Cruikshank; Mews' E. C. L.: cases.

Indictments must be certain. S. P., R. v. Wheatley; S. v. Thurstin; C. v. Eastman; Moore v. C.: 19-23.

235. U. S. v. MILLS (1833), 7 Pet. 138 (8 L. ed. 138); 2 Bish. New Crim. Proc. 1002.

Mills stated: This case, like *Cruikshank,* was reviewed upon a certificate of division among the judges of the circuit court, before whom was pending a motion in arrest of judgment, for alleged omissions in the indictment. Mills was indicted as an aider and abettor to rob the U. S. Mail—for a conspiracy to rob. It was not averred in a separate count that the robbery had actually been committed, but it did appear elsewhere. For such omission it was claimed the indictment was insufficient. However, the court held otherwise, and said:

"The general rule is that, in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offense must be set forth with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged." R. v. Waters: 70-74.

It is sufficient to lay the charge in the words of the law. U. S. v. Gooding: 212. 2 East, P. C. 781; 2 Leach, C. C. 578. *Mills* and *U. S. v. Cook* are widely cited cases upon the sufficiency of an indictment. They emphasize the use of pleadings to apprise a defendant with what he must meet at the trial. *Huntsman; Cruikshank:* 231-232. "The iteration and reiteration of the use of pleadings to apprise a defendant" (Guedel: 74*a*) seems to leave bad the effect to obscure other conserving principles, and Datum Posts. In "American law," these are not made prominent nor are they uniformly respected. Dovaston: 217.

Leading Cases.—

236. SPRAIGUE v. THOMPSON (1886), 118 U. S. 90 (30 L. ed. 115).

Construction. Statutes and other compacts may be valid in part and void in part. Mayor of Valverde, 19 Colo. 104, 41 Am. St. 208, n.; Chicago, etc. R. R., 149 Ill. 361, 41 Am. St. 278-304, n.; Fisher v. McGirr (*casus omissus* cannot be supplied); *Ut res magis valeat,* etc.; Penniman's Case, 103 U. S. 714; Virginia Coupon Cases; Noel v. P., 187 Ill. 587, 79 Am. St. 238, n.; Brown v. P., 29 Mich. 232; Suth. Stat. 296-308.

Statutes void in part. Blake; Austin v. Tennessee; Osgood v. R. R. Suth. Stat. 169-178; Bish. Stat. Crimes, 34; Fayette Co., 47 Ohio, 503, 10 L. R. A. A. 196, n.; Lawton, 40 Fed. Rep. 480, 7 L. R. A. 55, n.; McGowan, 111 Cal. 57, 52 Am. St. 149.

Contracts also may be void in part. Mallan: 373; Miller v. Race. See ILLEGAL CONTRACTS. Or a plea. Rison. Statute must speak for itself. Omissions cannot be inserted nor can insertions be omitted. Blake (each word must be given effect); In re Walker (1895), 110 Cal. 387, 52 Am. St. 104. See *Casus omissus;* James: 233 (denial of rule); Ballentine, 3 Idaho, 496, 95 Am. St. 17-28, n.

Borrowed statutes, how construed. S. v. Moore: 222*a*, Suth. Stat. 191, 319. See STATUTE.

Constitutions may be void in part. McCardle, 66 N. J. Law, 590, 88 Am. St. 496 (*Ut res magis valeat quam pereat*).

237. CALDER v. BULL (1798), 3 Dall. (Pa.) 386, Myer, Vested Rights, 1, 2 Thayer, Const. Cas. 1435; stated, 1 Kent, 409, Myer, Vested Rights, 1; 1 Tucker, Const. 180, 2 *id.* 321 (*ex post facto* law); cited, Suth. Stat., 3 Pars. Conts. 504, Cool. Const. Lim., Sedgk. Stat. *q.v.*, End. Stat., 3 L. R. A. 181, 5 Crim. Law, Mag. 325-528; Dash: 237*a*; Brown Jurisdic., 1 Bish. C. L. 279-284: cases.

Ex post facto laws; Nova constitutio futuris formam imponere debet, non præteritis: A legislative enactment ought to be prospective not retrospective in its operation. Kring, 107 U. S. 221; 3 Thayer, Const. Cas. 1448; Tucker, Const. For history of *ex post facto* clause in federal constitution, see Medley case, cited, 134 U. S. 160, *post.* Fletcher v. Peck, cited, Cool. Const. Lim. 320, 327; Suth. Stat. Construc. 465-467; Larkins, 1 Okla. 53, 11 L. R. A. 413, n.; P. v. Hayes, 140 N. Y. 484, 37 Am. St. 572-596, ext. n.; 23 L. R. A. 830; Wright, 3 Wyo. 478, 31 Am. St. 94, n.; Lindzey, 65 Miss. 542, 7 Am. St. 674; S. v. Cooler, 30 S. C. 105, 3 L. R. A. 181, n.; Gibson v. Mississippi, 162 U. S. 565, 590.

Calder stated: A probate court decreed against the validity of a will, and the time for appeal—a review—expired. Afterward the legislature convened, and set that decree aside, and ordered a new hearing, at which the will was declared valid. From the state courts, the cause was re-

Leading Cases.—237. Calder.

moved to the supreme court of the United States, and it was there assigned for error, that the act was an *ex post facto* law. Upon this followed a definition of *ex post facto* and of retrospective laws. The former relates only to crime, and means that an innocent act can not afterward be declared a crime, nor can a criminal act be augmented or aggravated and added to, after its commission; nor can the burden of proof be diminished or lessened or changed in favor of the prosecution after a crime is committed. Calder; it is stated in Dash.

Municipal bonds not affected by change of laws. Von Hoffman; Bronson.

The nullity of ex post facto laws. 1 Bish. C. L. 279-284; Garvey's Case, 7 Colo. 384, 4 Crim. Law Mag. 715. Contracts may be paid in legal-tender medium at the time of maturity. Legal Tender Cases; Juilliard, 110 U. S. 449. *Contra:* Griswold, 2 Duv. (Ky.) 20, 8 Wall. 303 (19 L. ed. 503); 2 Thayer, Const. Cas. 222, 1 Rand. Com. Pap., § 98, n. (reviewing Legal Tender Cases), 2 Danl. Nego. Insts., § 1247, n. Note payable in "specie" calls for gold and silver. Trebilcock, 12 Wall. 687.

Ex post facto laws; when interdicted to the states, by the XIVth Amendment. Mallet, 181 U. S. 589 (stating Calder; Kring).

Retrospective statutes. Otoe County, 111 U. S. 1; cases; Suth. Stat. Construc. 463-483; Killam, 39 Pa. St. 120, 1 Am. Law Reg. (N. S.) 18-35, n., End. Stat. 267-294; Bullard, 10 Mont. 168, 11 L. R. A. 246, n. (congress may impair a contract to regulate commerce). See DUE PROCESS OF LAW. State statute changing punishment in the least is *ex post facto.* Medley (Colorado Case), 134 U. S. 160 (33 L. ed. 834, n.). *Ex post facto* laws and bills of attainder. 5 Crim. Law Mag. 325-358; 2 Tucker, Const. 656.

Prisoner may be given an allowance for good behavior. Howard v. U. S., 75 Fed. 986, 34 L. R. A. 509, n.; Miller, 110 Mich. 676, 64 Am. St. 376 (heavier penalty for second offense allowable).

Crimes must be prescribed by previous law. 12 Cyc. 139-144.

Retrospective decisions are more obnoxious than are retroactive legislation, for the reason that the judicial department should not change the laws at all. *Sub,* Bronson.

237a. DASH v. VAN KLEECK (1811), 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; 2 Thayer, Const. Cas. 1498; 1 Kent, 291, 2 *id.* 15, Cool. Const. Lim. 24, n., 441, 447, 6th ed.; Suth. Stat.; § 20 in Hughes on contracts. Cited, §§ 5*b*, 17, 28, 52, 76, 101, 179, 203, 206, 350, 351, 352, Hughes' Proc.

Cited, §§ 5, 33, 80, 119, 120, 139, 140, 262, 266, Gr. & Rud.

Departure from usual procedure vitiates. Anthony, 83 Va. 338, 5 Am. St. 277; Windsor; Munday; Hume.

Leading Cases.—237a. Dash.

Retrospective decisions and statutes impairing or denying a remedy for any right arising from the principles of the common law, and whether *ex delicto* or *ex contractu* in character, are forbidden. Dash; Bronson; Von Hoffman; Tiede. Pol. Power; Terry (defense cannot be taken away). Rights arising from torts are equally protected as contracts. 2 Mech. Sales, 970. Division of state power. Dash; Dennett: 145.

Legislatures cannot impair vested rights; a fortiori, or other state agencies cannot, for reasons involved in the division of state power. They cannot make and unmake laws. But see Hanford: 86. *Lex non vetat.* Lange: 159.

Leges posteriores priores contrarias abrogant: When the provisions of later statutes are opposed to those of an earlier, the earlier is considered as repealed. 95 Minn. 153, 111 Am. St. 448, 462, ext. n.

238. BRONSON v. KINZIE (1843), 1 How. 311 (11 L. ed. 143); Myer, Vested Rights, McClain, Const. Cas. 1028. *Nova constitutio futuris formam imponere debet non præteritis:* A legislative enactment ought to be prospective, not retrospective in its operation. Bro. Max. 34-41; Dash; Suth. Stat. *q.v.;* Cool. Const. Lim. 346-352; Sedgk. Stat. 613-634; 2 Tucker, Const. 389; 1 Cool. Tax. 128; Brown, Jurisdic.; Kirkman, 22 Utah, 100; 83 Am. St. 774, 2 Beach, Conts. 1667-1670; Suth. Stat. Cited, § 20, Hughes' Conts.

Cited, §§ 179, 305, 334, 351, 352, Hughes' Proc.; §§ 140, 163, 268, Gr. & Rud.

Bronson stated: In 1838 K. mortgaged his lands to B. under an existing condition allowing a mortgage to foreclose immediately upon a breach of condition and giving the right of absolute sale to satisfy the debt. In 1841 the legislature of Illinois enacted laws fettering foreclosure proceedings by giving the mortgagor one year to redeem, and also providing for an appraisement and that lands must sell for at least two-thirds of the appraisement. Afterward B. undertook foreclosure proceedings under the law of 1838, and K. insisted the law of 1841 should govern. *Held,* that the latter was void. But the time for redemption may be altered or added.

Rights given by a statute may be abrogated at any time before final judgment establishing rights thereon. See REPEAL.

Impairing the obligation of a contract a federal question. Chicago R. R. v. Nebraska, 170 U. S. 57; Fletcher v. Peck; Terre Haute R. R. v. Indiana (a remedial act defined as flagrantly unconstitutional). *Impairing the obligations of contract forbidden.* 1 Cool. Tax. 107-129.

Limitations on power to change rules of procedure. Burk, 113 Ia. 232, 86 Am. St. 372, n. See ADJECTIVE LAW. Windsor.

Legislatures alone contemplated by constitution; other state agencies may destroy contracts. Hanford: 86; Cool. Const. Lim. 36, n., 7th ed.

Leading Cases.—238. Bronson.

Impairing a remedy impairs the obligation of contracts. Von Hoffman; Bronson; Louisiana, 102 U. S. 203 (26 L. ed. 132, n.): cases.

Courts may change rules of evidence. This is not impairing the obligation of a contract. S. v. Heldenbrand, 62 Neb. 136, 89 Am. St. 723, n.; S. v. Thomas: 257. Still it might, *e. g.* a deed conclusively imports a consideration. Jackson v. Cleveland; Rann: 412. Now, if this rule were changed, then a grantee would be required to obtain more evidence and possibly impossible evidence. The value of a contract includes the power to establish or to prove it. A right depends upon a practical remedy, also the remedy contracted for. Gilliam (Mont.), 31 L. R. A. 721, ext. n., 33 L. R. A. 556.

The doctrine of Bronson is also found in S. v. Sears (1896), 29 Or. 508, 54 Am. St. 808, n.; 55 Kan. 485; 49 Am. St. 271; 33 L. R. A. 556; 1 Kent, 419; Cool. Const. Lim. 346-352; Sedgk. Stat., 613-634; Yeatman, 2 N. Dak. 421, 33 Am. St. 797, n.; Swinburn, 17 Wash. 611, 61 Am. St. 932, n.

Ex post facto and retrospective laws are closely allied, yet distinguished. The former is discussed in Calder, 5 Crim. Law Mag. 325-528; Dash; Brown, Jurisdic.; 1 Bish. C. L. 279-284; cases. Cool. Const. Lim.; *Kring v. Missouri* (1883), 107 U. S. 221, 2 Thayer, Const. Cas. 1448, § 294, Gr. & Rud.; Suth. Stat. Construc. 463-483: cases; Cummings v. Missouri (1866), 4 Wall. 277, 2 Thayer, Const. Cas. 1446-1448, n.

Retrospective decisions and changes of the law denying a remedy, not permissible. Dash; Von Hoffman; P. v. Hayes (1894), 140 N. Y. 434, 37 Am. St. 572-596, ext. n., 23 L. R. A. 830, 83 Am. St. 774, n. See Hanford: 86; Lange: 159.

Common-law rights to a remedy are equal to any rights. Pennoyer; Dash; S. v. Heldenbrand (1901), 62 Neb. 136, 89 Am. St. 743, n.; Cruikshank; 2 Kent, 8, 12, § 54.

239. VON HOFFMAN v. QUINCY (1867), 4 Wall. (U. S.) 535-555 (18 L. ed. 403), 2 Thayer, Const. Cas. 1654; stated, Cool. Const. Lim. 355, Ror. Interstate Law, 104, 2 Tucker, Const. 829, 839; cited, Dill. Corp., Beach, Corp., Bish. Conts. 561, 565, Suth. Stat. 206, 471-478, Ror. Interstate Law, 104-115, Bish. Writ. Laws, 197, 1 Kent, 419, n., 2 Beach, Conts. 1668, Cool. Tax., Fost. Fed. Prac. (Mandamus), Brown, Jurisdic. 163.

Cited, § 179, Hughes' Proc.; § 140 Gr. & Rud.

Von Hoffman stated: V. held coupons from bonds issued by the city of Quincy, Illinois, under Acts of 1851, authorizing local taxation to pay those bonds. Afterward the powers of the city were restricted by other acts, and upon this did not pay. Judgment and mandamus were obtained. (Knox v. Aspinwall). *Held:* A legislature may bind itself as effectually as a private person. Fletcher v. Peck stated and applied. That subsequent acts derogating from the power

Leading Cases.—239. VonHoffman

to tax and pay those bonds were nullities. Bronson; Suth. Stat. Construc. 471-478. States and their corporations must be honest. Von Hoffman. And their creditors will be protected by the United States. Von Hoffman; 1 Dill. Corp., 849-854; 2 Beach, Corp., 1423. The condition of the debtor is an element of trust, which will be respected and enforced. Von Hoffman; 1 Dill. Corp., 849-854; 1 Beach, Corp., 435, 473, 1141. Common law and statutory incidents annex themselves. *Expressio eorum,* etc. Von Hoffman, 2 Beach, Pub. Corp., 1412, 1423, Bish. Conts. 565; Fawkner, 88 Iowa 169, 45 Am. St. 230. A principal thing carries its incidents. Von Hoffman; *Expressio eorum,* etc.; Logan: 248; M'Culloch: 147.

Statutes in force at time contract is made are incorporated by implication. Von Hoffman; Green v. Biddle (1823), 8 Wheat.: 92; McCracken, 2 How., 612; P. v. Bond, 10 Cal. 570; Bronson; Ogden; Sturges; Planter's Bank; Mason. These and other cases stated and applied. Von Hoffman; Pom. Const. Law 512-627 (*ex post facto* and retroactive laws); Forepaugh, 128 Pa. 217, 15 Am. St. 672, 5 L. R. A. 508-513, ext. n. (rights of property cannot be changed). Remedy, a part of the contract. An obligation without a remedy cannot exist. Von Hoffman; 1 Kent, 456; Sedgk. Stat., 652; Mason v. Haile; Edwards v. Kearzey. Remedies may be changed, but not the obligation. Von Hoffman; Ror. Interstate Law, 104; Suth. Stat. 471-478; Bronson.

Dissolution of corporation: effect upon liabilities. 1 Beach, Corp., 457; 1 Dill. Corp., 170; Ror. Int. Law, 107.

Partition and dissolution of corporations. 1 Beach, Pub. Corp. 436-481. Retrospective decisions cannot be made affecting contracts. Von Hoffman; 1 Beach, Pub. Corp., 1412; Bronson; 2 Beach, Conts. 1664. Mandamus after judgment. Von Hoffman; 2 Beach, Pub. Corp. 1410; Knox Co. v. Aspinwall. Corporations subject to legislative control, if no contract is impaired. Von Hoffman; Lycoming; Bish. Conts. 565; Pom. Const. Law 587, *sub,* Hill v. Boston.

240. TERRY v. ANDERSON (1877), 5 Otto (U. S.), 628 (24 L. ed. 365), 121 N. C. 206, 61 Am. St. 661; Turner v. New York (1897), 168 N. Y. 95, 168 U. S. 90; Ror. Int. Law, 231, 254, 1 Kent, 419, n.; Tucker, Const. Cited, § 351, Hughes' Proc.

Constitutional law; impairing the obligation of contracts; statute of limitations. These are subject to change or repeal at any time. This is only a part of the remedy and is no part of the contract. Mason; Bronson; Culbreth, 121 N. C. 205, 61 Am. St. 661; Koshkonong, 104 U. S. 668; Bell v. Morrison.

After the statute has accrued it is a vested right and cannot be taken away. Suth. Stat. 480: cases; Wilson v. Isininger

Leading Cases.—240. Terry.

(1901), 186 U. S. 55; Baltimore R. R., 158 Ind. 25, 92 Am. St. 293; Sedgk. Stat. 109; Cool. Const. Lim. 448; Bicknell, 113 U. S. 149, End. Stat. 279. *Sub,* Whitcomb v. Whiting; Gilbert, 159 N. Y. 118, 45 L. R. A. 118: cases; McEldowney, 44 W. Va. 711, 45 L. R. A. 600-615, ext. n. See Fletcher v. Peck.

Statute accruing at the domicile of the parties is available elsewhere, and in states where the bar is longer. Eingartner, 103 Wis. 373, 74 Am. St. 871. *Contra:* Arrington, 127 N. C. 190, 80 Am. St. 791, n.

Vested rights cannot be impaired. Suth. Stat. 480: cases. See VESTED RIGHTS, *id.* Is property the same as tangible things. Suth. Stat. 480.

241. BARRON v. BALTIMORE (1822), 7 Pet. (U. S.) 243 (8 L. ed. 673); cited, Marsh. Const. Dec. 724-735, n.; Thayer, Cas. Const. Law, 1 Kent, 407, Cool. Const. Lim., Dill. Corp., Beach, Pub. Corp., Sedgk. Stat., 10 Curt. 464, 1 Thayer, Const. Cas. 449; stated, McClain, Const. Cas. 14, n., *q.v.* As to the Fourteenth Amendment, and what it means: O'Neil v. Vermont, 144 U. S. 323, Brown, Jurisdic., 2 Tucker, Const. 326-337 (first ten amendments); Cruikshank; 3 Cook, Corp. 2632; 1 Cool. Tax. 55: cases; 1 Lewis, Em. Dom. 11: cases.

Cited, §§ 19, 22, 221, 349, Hughes' Proc.; §§ 64, 152, 158, 159, 268, 294, 297, Gr. & Rud.

Barron stated: Barron owned a wharf at deepest water, and so it was most valuable. Artificial streams created by the city carried and deposited detritus near the wharf, and by such means filled up its water approach and made it shallow and thus damaged the wharf. For this B. sued the city, relying upon the Fifth Amendment to the constitution of the United States, which provides that private property shall not be taken or damaged without paying a just compensation therefor. But it was held that this had no application to the states or their agencies, and B. was defeated.

States only bound where named to be bound in federal constitutions. 2 Kent, 407; James: 233, 2 Lewis, Suth. Stat. 514. *Roy n'est lie per ascun statute, si il ne soit expressement nosme* is applied in Barron; Lee v. Tillotson (1840), 24 Wend. 337, 35 Am. Dec. 624, Tiede. Pol. Power, 5; 1 Lewis, Em. Dom.: cases.

The first ten articles of the amendment were not intended to limit the power of the state governments in respect to their own people, but to operate on the national government alone. 15 L. R. A. 601; Brown v. Walker, 161 U. S. 591; Jack v. Kansas; St. Joseph, 128 Mo. 588, 49 Am. St. 577, 12 Am. R. R. & Corp. Rep. 407; Presser, 116 U. S. 252, 260, 265; Cook v. U. S., 138 U. S. 181; S. v. Atkinson, 40 S. C. 363, 42 Am. St. 877, n.; Withers, 20 How. 84, 15 L. ed. 816, n. (Fifth Amend. does not apply to states. Barron); 62 L. R. A.: cases; Ohio, 194 U. S. 445; Cruikshank: 232.

Leading Cases.—241. Barron.

"The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated." Barron.

Eminent domain; protection of property from state spoliation is not guaranteed by the federal constitution. It only protects from wrongs and oppression from federal power, not state power. Barron; Withers, *supra.*

It does not interdict compulsory self-crimination. St. Joseph, *supra;* Spies (Anarchist's Case); Presser.

General limitations in the constitution do not apply to the states. Wilkerson; Barron. In other words the states are not bound unless they are named to be bound. 1 Kent, 407: cases; 2 Tucker, Conts. 325: cases.

The guaranties of protection and of rights in the first ten amendments afford no protection whatever, except from federal agencies. They impose no restrictions on the states, e. g., the guaranty of jury trial, etc., applies only to proceedings in federal courts. Eilenbacker, 134 U. S. 31. But the guaranty of "due process of law" in the XIVth Amendment does apply to the states, for it reads: "No state shall deprive any person within its jurisdiction of life, liberty or property without due process of law," etc. James: 233. This applies to the States, for they are named to be bound. *Roy n'est lie per ascun,* etc. In this relation arises considerations reflected from *Nullum tempus occurrit regi.*

No more important cases can be introduced to the practitioner than Barron, Cruikshank, James, Tarble's Case, Martin v. Hunter's Lessees, M'Culloch, Logan, Windsor and Campbell v. Porter.

242. WORK v. S. (1853), 2 Ohio St. 297, 1 Lead. Crim. Cas. 482-496, ext. n., 59 Am. Dec. 671-677, n., 43 L. R. A. 35.

Cited, §§ 19, 33, 45, 90, 158, 300, 304, Hughes' Proc.; §§ 57, 115, 152, 169, 294, Gr. & Rud.

Jury trials. A jury of twelve is meant in constitutions, unless otherwise expressed. Work; 1 Bish. Cr. Proc. 890-894; Whart. Cr. Pl. & Pr. 605-695; Clark, Crim. Proc. 158-168; Lommen, 65 Minn. 196, 60 Am. St. 450, n.; Thompson, 170 U. S. 343 (42 L. ed. 1061, n.), 190 U. S. 246; Bailey, Jurisdic. 64, And. Dic. 582.

"Jury" in a constitution means a jury of twelve. Words like "jury" and "jurisdiction" are given a common-law meaning, of possible. Contemporanea expositio, etc. And thus the common law is favored. Murray Case. *Contra,* S. v. Kaufman, 51 Ia. 578, 33 Am. Rep. 148, 1 Crim. Law Mag. 57-64, n.

Leading Cases.—242. Work.

Number and agreement of, necessary for a valid verdict. S. v. Bates, 14 Utah, 293, 43 L. R. A. 33-81, ext. n. (able *resume*).

Contracts affecting the right to judicial trial. Scott. And of personal liberty. Gr. Pub. Pol. 466-477. The safeguards that liberty has thrown around her children cannot be bartered away nor dispensed with. See §§ 14-18, Hughes' Conts.; Cruikshank.

Whatever is a subject of waiver is a subject of contract, for the essence of waiver is assent express or implied. This should be comprehended. *Cf. Consensus.* "Jury" as used in a statute; how construed. Suth. Stat. 423.

Constitutions are construed in the light of old law. Murray: 219; C. v. Hess: 215.

If a constitution commands a record, this is construed to mean a bound volume formally made and preserved. Montgomery: 47.

243. WARREN v. SLADE (1871), 23 Mich. 1, 9 Am. Rep. 70-74. *Computation of time; rules.* The first and last day. Halbert v. San Saba Springs Ass'n, 89 Tex. 230, 49 L. R. A. 193-248, ext. n.; Citizens' Bank v. Ober (1874), 1 Abb. 503; 4 Bank Reg. 156, 10 Am. Law Reg. (N. S.) 36-49, ext. n., 1 Beach, Conts. 631-638, 2 Bouv. Dic.; S. v. Michel (1900), 52 La. Ann. 936, 68 Am. St. 364-386, n.

The general rule is, the first day is excluded and the last is included. Warren; Dutcher, 94 U. S. 553 (states and follows English rule). If the last day is on Sunday, then the following day is the day of performance. But see Sedgk. Stat. 358. Fractions of a day. See DAY; Bouv. Dic. When statutes take effect. Suth. Stat. 104-111, 160. Statutory provisions requiring official acts directory as to time. Suth. Stat. 448-450.

Computing in case of notices. Cool. Tax. 829; Ricketson: 59. Time fixed for official action; when mandatory and when directory. Cool. Tax. 481-489.

244. COHENS v. VIRGINIA (1821), 6 Wheat. 399 (5 L. ed. 257), Thayer, Const. Cas. 285 (a court is bound by its records). Marshall's Const. Dec. 357-420; Tuck. Const. See DICTUM; Houston: 245; Horan: 85.

Cited, p. 34; §§ 10, 13, 17, 18, 19, 20, 28, 30, 39, 79, 87, 95, 98, 100, 124, 173, 186*a*, 210, 213, 234, 241, 251, 260, 268, 272, 274, 276, 278, 291, 352, Hughes' Proc.

Cited, §§ 111, 137, 147, 152, 213, 237, 266, 268, 311, Gr. & Rud. See STRAUDER.

Dicta do not bind. Houston; Northern Bk. v. Porter Township, 110 U. S. 610, 615; *Martin v. Evans;* (opinions can neither augment nor diminish the record proper); Commercial Bk., *sub,* Houston.

To indicate how opinions are to be construed, we quote from U. S. v. Wong Kim, Ark., 169 U. S. 678. Justice Miller in the Slaughter House cases, 16 Wall. 73, used language broader than the *record*—"the case" before him—and the court restrained this language in the Wong Case as follows:

Leading Cases.—244. Cohens.

"Mr. Justice Miller, indeed, while discussing the causes which led to the adoption of the 14th Amendment, made this remark: 'The phrase, "subject to its jurisdiction," was intended to exclude from its operation children of ministers, consuls, and citizens or subject of foreign states born within the United States.' 16 Wall. 73. This was wholly aside from the question in judgment, and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities; and that it was not formulated with the same care and exactness, as if the case before the court had called for an exact definition of the phrase, is apparent from its classing foreign ministers and consuls together—whereas it was then well settled law, as has since been recognized in a judgment of this court in which Mr. Justice Miller concurred, that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as intrusted with authority to represent their sovereign in his intercourse with foreign states or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdition, civil and criminal, of the courts of the county in which they reside. 1 Kent, 44; Story, Conft. Laws, § 48; Wheaton, International Law, 8th ed., § 248; The Anne (1818), 3 Wheat. 435, 445, 446; Gittings v. Crawford (1838), Taney, 1, 10, Res Baiz (1890), 135 U. S. 403, 424.

"In weighing a remark uttered under such circumstances, it is well to bear in mind the often quoted words of Chief Justice Marshall: 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided but their possible bearing on all other cases is seldom completely investigated.' Cohens."

This language is widely quoted and meets universal acceptance. Wells, Res Adj. 581; *Wadsworth,* 18 Colo. 600, 36 Am. St. 600, 23 L. R. A. 812, 8 Am. R. R. & Corp. Rep. 127. Johnson v. Bailey (Colo.); 40 Wis. 190; *Uhfelder v. Levy,* 9 Cal. 607, 615, *Chapman v. S.,* 104 Cal. 690, 43 Am. St. 158, n.; *Johnson's Est.,* 98 Cal. 531, 21 L. R. A. 380-383: cases; *Wagner v. Law* (1892), 3 Wash. 500, 28 Am. St. 56, 59; Windsor; Cool. Const. Lim., 62; U. S. v. Wong Kim, Ark. (1899), 169 U. S. 649, 678; *Woodruff v. Parham* (1869), 8 Wall. 123, 9 Am. Law Reg. (N. S.) 25.

Cohens but involves a fundamental rule of construction; *Verba generalia restringuntur ad habilitatem,* etc. 1 Chit. Conts. 120-122; *Contemporanea expositio,* etc.

Leading Cases.—244. Cohens.

Opinions; how far considered to determine the law of the case. *Thompson*, 168 U. S. 451.

Opinions are construed like judgments of inferior courts—like taxation proceedings. An inferior judgment is disregarded, except for the record from which it arises. Kempe's Lessee: 115: cases.

Pleadings essential to confer jurisdiction and to restrain courts. See JURISDICTION; Windsor: 1; Munday: 79.

Courts cannot choose—select their cases and decide whatsoever they will. S. v. Baughman: 268; Weaver v. Toney: 67. Every sentence of every court of every grade may be inquired into; and the reality of injured party; of injury and wrongdoer may always be sought after, and if wanting, then such fundamental defects may be alleged and proved (Williams v. Eggleston: Windsor), especially in all claims for *res adjudicata*. Cromwell: 26. Unreal, false, sham and ficticious cases may always be shown to be such. Courts cannot rightfully pass on such. S. v. Baughman: 268. *Debile*, etc. *Ultra vires* acts are nullities unless they are crimes. A court is bound by its records. Campbell: 2; Drake, Attach., §§ 86, 87. And this record may always be alleged, proved and held up to limit judgments and decrees, and *a fortiori* opinions.

A judgment reciting or declaring jurisdictional facts is limited by what the record discloses as to those facts. Olebermann, 93 Wis. 669, 57 Am. St. 947, n. See Narrow v. Grogan (Ill.).

To emphasize we quote:

"But it is an equally well settled rule in jurisprudence that the jurisdiction of any court exercising jurisdiction over the subject may be inquired into in every other court when the proceedings in the former are to be relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law, or whether the point ruled has arisen under the laws of nations, the practices in chancery, or the municipal laws of states." Williamson: 65; Horan: 85.

A court is but an agency, of government like the other departments of state; it is co-ordinate with the other departments of state. P. v. Stapleton, 18 Colo. 568. But see *Cujus est instituere*, etc.

A court must issue from and be founded upon a constitution and derive all its just powers therefrom. Marbury: 142.

Looking from these, no court can make a record, without power to make it. Starbuck: 263; Van Fleet, Coll. Att., §§ 432, 439, 471, 548, 612; 1 Whart. Ev. 796, 808; 123 N. Y. 445, 20 Am. St. 77; Mech. Ag. 810. Judicial recitals in a decree may be contradicted. Ferguson: 264. A sheriff's return may be impeached. Hauswirth: 51. A domestic judgment may be impeached. Needham: 261; Harshey; Furman: 262.

Leading Cases.—244. Cohens.

A judgment void for want of jurisdiction in any and every form is worthless, and no rights can be built upon it. Freem. Judg. 117; Van Fleet, Coll. Att. 14-16. *Debile fundamentum fallit opus.* See *Coram judice.*

245. HOUSTON v. WILLIAMS (1859), 13 Cal. 24, 73 Am. Dec. 565-567, 1 Thayer, Const. Law, 184; Martin v. Evans (opinions of courts depend upon the record); Commercial Bank, 151 Ill. 329, Tiede. Pol. Power, 166*a*; Phœnix Ins. Co. v. Fuller (1898), 53 Neb. 811, 40 L. R. A. 408, 68 Am. St. 637; Horan: 85; Dovaston: 217.

Cited, §§ 19, 98, 251, 288, Hughes' Proc.; § 152, Gr. & Rud.

246. MARTIN v. HUNTER'S LESSEE (1816), 1 Wheat. (U. S.) 304 (4 L. ed. 97), 1 Thayer, Const. Cas. 123, McClain, Const. Cas. 746-763, Boyd, Const. Cas. 616. See *Coram judice.*

Cited, p. 34; §§ 10, 16, 17, 20, 28, 39, 52, 76, 124, 177, 186*a*, 203, 206, 210, 213, 268, 271, 278, 291, Hughes' Proc.

Cited, §§ 33, 46, 47, 80, 137, 147, Gr. & Rud.

Appellate jurisdiction of supreme court of the United States over state courts. Cohens.

Proceedings coram judice essential for a sentence. Martin.

Construction is for the perpetuity of government: Trist: 212; Murray: 219.

247. TARBLE'S CASE (1871), 13 Wall. (U. S.) 397 (20 L. ed. 597), McClain, Const. Cas. 43; Robb v. Connolly (1883), 111 U. S. 624. Brown, Jurisdic.; also in Hughes on Contracts.

Cited, p. 13; §§ 17, 20, 34, 210, 213; §§ 46, 99, 137, Gr. & Rud.

Polity of federal government affects procedure. Martin; Cohens; Cruikshank: 232; Texas v. White (1868), 7 Wall. (U. S.), 700, Boyd, Const. Cas. 552, Siebold, 100 U. S. 371, Boyd, Const. Cas. 571. A review in the supreme court of the United States of a state judgment depends upon a record. Campbell: 2. See PLEADINGS; SUPREME LAWS OF THE LAND.

Justification defenses depend upon a record, and, too, a sufficient record. J'Anson: 91; Savacool: 164; Six Carpenters'; Howard v. S.; Rushton. See Springer; Douglas v. Whiting (omission of a defendant's name in an execution vitiates an execution sale).

An authority must be pleaded is an important rule of pleading, the significance of which appears from considerations of *Res adjudicata* and the above cited cases. Hopper; Buck v. Colbath. See STORY.

M'Culloch: 47, Cohens: 244, Martin: 246, and Tarble's case should be collectively considered for sound instruction in constitutional law.

248. NEAGLE'S CASE (NEAGLE, IN RE) (1890), 135 U. S. 1 (34 L. ed. 35), 12 Crim. Law Mag. 23-49. *Sub*, Logan: 249. Cited, Hughes' Conts; § 151, Gr. & Rud.

A principal thing carries its incidents. The necessity for a judge to proceed and hold court involves the right to defend him. M'Culloch: 142; S. v. Townley: 225*a*.

Leading Cases.—

249. LOGAN v. UNITED STATES (1892), 144 U. S. 263 (36 L. ed. 429), 12 Sup. Ct. Rep. 617, Abb. Sel. Cas. Ev. 47, Thayer, Cas. Ev. 1072 (partial), 1 Thayer, Const. Cas. 343; stated, 34 Cent. L. J. 486, and in subsequent federal cases; cited, Brad. Ev. 72, 350, 1 Fost. Fed. Prac. 274 (competency of witnesses).

Logan stated: The Marlows and others were in the custody of one Johnson, a deputy United States marshal, for larceny in the Indian country within the exclusive jurisdiction of the United States. Logan and others conspired, combined and confederated together to mob them (§§ 5508, 5509, R. S. U. S. set out in the opinion), and that in furtherance of their conspiracy and to deprive the Marlows of "due process of law," they waylaid in the night-time the United States marshal while he was traveling with the Marlows in his custody, and with firearms assaulted said prisoners and murdered Epp Marlow while in the custody of the United States marshal. There were several trials of Logan and his confederates, and several of them were acquitted. Owing to this Logan pleaded former jeopardy. However, this plea was denied, and he was finally tried and convicted.

The surviving Marlows were permitted to testify on behalf of the government, that while they were escaping from the fight, Charles Marlow told his companions he believed Logan was the man at whom he shot and who was shooting at him during the fight. Logan objected to this evidence as declarations made in their absence—as hearsay. But it was admitted as part of the *res gestæ*. Sparf.

After a conspiracy comes to an end, it is otherwise. Sparf v. U. S.; 1 Gr. Ev. 233; Brown v. U. S., 150 U. S. 93, 98, U. S. v. Gooding: 202.

Logan asked for an instruction, that he was not liable under the laws of the United States—it had no jurisdiction of his acts. This was refused, and instead, the court instructed the jury that when a citizen of the United States is in its custody he has a right to a speedy public trial by an impartial jury, according to "due process of law," to humane treatment and to protection against violence, etc., to which Logan excepted. This was a pivotal point in the case. In addition, Martin and Spear, witnesses for the government, were shown to have been convicted in other states, and that Spear was afterwards pardoned in Texas. Logan objected to these witnesses—to Spear because a statute of Texas made him incompetent. Out of these facts the case took a wide range, and as to the federal question involved (the instruction given by the trial judge) M'Culloch, Ableman, and their cognate cases were applied with great force in logical detail. Supremacy of the national government in matters of national concern is pronounced and re-

Leading Cases.—249. Logan.

asserted in a masterful and consistent reasoning, and in line with Marshall's and Taney's great classics.

The statute of Texas is local in that state. At common law conviction for a felony does not destroy competency of a witness. Federal statutes enumerate grounds of incompetency for conviction (statutes quoted), but these do not include a case like Spear's.

"The laws of the state in which the court shall be held shall be the rules of the decision as to the competency of witnesses in the courts of the United States, in trials of common law, in equity and in admiralty. 12 Stat. 598."

Logan is not only interesting, but most instructive. It affords a splendid standpoint to view fundamental maxims of construction (*Expressio eorum*, etc.; *Cuicunque aliquis quid*, etc.), and also their companion pieces, M'Culloch: 142, Ableman and cognate case; Juilliard, 110 U. S. 421, 441, 2 Thayer, Const. Cas. 2255; U. S. v. Reese, 92 U. S. 214, 217; Cruikshank; Strauder, 100 U. S. 303, 1 Thayer, Const. Cas. 543; cited, 1 Beach, Pub. Corp. 137, 3 Crim. Law Rep. (Hawley), 515; Virginia, 100 U. S. 339 (25 L. ed. 676), 3 Crim. Law Rep. (Hawley), 537; U. S. v. Harris, 106 U. S. 629; Civil Rights Cases, 109 U. S. 3 (27 L. ed. 825), 1 Thayer, Const. Cas. 554; 190 U. S. 137; Yarbrough, 110 U. S. 651; U. S. v. Waddell, 112 U. S. 78; Baldwin, 120 U. S. 678; Neagle, Seibold, 100 U. S. 371, 394; U. S. v. Perez; Simmons v. U. S., 142 U. S. 148 (former jeopardy). All these cases are cited, and most of them are stated and reviewed, with others. Quarles, 158 U. S. 532-558 (it is the right of a citizen to inform of violations of law). Civil Rights Cases, *supra;* 190 U. S. 137. "Rights, privileges and immunities" (14th Amend. to Constitution of United States); meaning of. §§ 134-137; 1 Beach, Pub. Corp.; Bartemeyer; 190 U. S. 133: cases.

Accessorium non ducit sed sequitur suum principale: The incident shall pass by the grant of the principal, but not the principal by the grant of the incident. See Neagle (Cunningham v. Neagle); cited, Ror. Interstate Law, 297, 431, 39 Fed. Rep. 833, 5 L. R. A. 78, 1 Thayer, Const. Cas. 355 (federal authority protects federal officials on the way to exercise their functions). Ex-Judge Terry, of California, assaulted Justice Field, of the Supreme Court of the United States, while en route to hold court in California, and United States Marshal Neagle killed Terry. *Held,* state had no jurisdiction. *In præsentia majoris cessat potentia minoris;* Juilliard (Legal Tender Case), 110 U. S. 421, 18 L. ed. 204 (congress may create legal tender in payment of debts as an incident necessary and proper for carrying into execution the power vested by the constitution. Field, J., dissenting); U. S. v. Waddell, 112 U. S. 76 (claimant of homestead protected by federal government in establishing his rights to title); Baldwin, 120 U. S. 678 (congress, by appropriate enactment, protect Chinese residents in the exercise of rights guaranteed them by treaty, but it has not in §§ 5508, 5519, 5536, R. S. U. S.); Yarbrough, 110 U. S. 651 (congress may protect the elec-

Leading Cases.—249. Logan.

tive franchise when exercised in the selection of federal officials); Strauder (state statute excluding all but white jurors conflicts with XIVth Amendment); Virginia, 100 U. S. 339 (sheriff discriminating against negro jurors, liable under federal laws); U. S. v. Reese (XIVth Amendment founds exercise of power for protection of voters; rejection of qualified vote must be because of race, color or previous condition of servitude); Civil Rights Case (XIIth and XIVth Amendments protect only against state action; Innkeepers, theaters and carriers may choose their patrons and specially provide for them; about this federal authority will not interefere; Bradley, J., dissenting). Cruikshank; U. S. v. Harris (XIVth Amendment, § 1, excludes state action only; it does not describe and regulate the conduct of citizens to each other); James: 233; Tennessee, 100 U. S. 257, Thayer, Cas. Const. Law, 316 (a United States deputy revenue collector killed one resisting arrest, for violating federal laws. *Held*, the state had no jurisdiction). Martin: 246; Cohens; Osborne, are stated and reviewed; also § 643, R. S. U. S., under which removals are made; M'Culloch; *Cuicunque aliquis quid*, etc.

Original package cases proceed upon the theory that protection of a principal thing demands protection of its incidents. Crowley, 137 U. S. 86; Leisy, 135 U. S. 100; Brown v. Maryland; Bartemeyer. And assignment of a right carries its remedy. Bronson: 238; Edwards v. Kearsey.

The telegraph is an instrument of commerce, and as such is not subject to state taxation or regulation of telegrams to be delivered in other states. Ratterman, 127 U. S. 411; Western U. Tel., 122 U. S. 347.

Commerce is within federal protection; hence its incidents are protected. Harmon v. Chicago, 147 U. S. 396, 7 Am. R. R. & Corp. Rep. 539-544; Gibbons; Brown v. Maryland; Norfolk, etc. v. Penn (state cannot tax an instrument of interstate commerce); Debs' Case; Penn. v. Wheeling Bridge Co. Obstruction of highways and of commerce and of the mail may be removed by the federal government. Debs' Case.

The supreme court of the United States is given appellate jurisdiction whenever a federal right, statute, constitution or treaty is drawn in question, irrespective of citizenship. Mathews v. Zane, 4 Cranch, 382; Williams v. Norris, 12 Wheat. 117.

Crime depends upon a punishment. *Quod lex non vetat permittet.* What the law does not forbid, it permits, applies here.

Punishment is an incident of crime, and denying the incident denies the principal. That it is no contempt of court if no punishment can be inflicted, we elsewhere observe. *Expressio eorum*, etc.; *Cuicunque aliquis quid*, etc.; Von Hoffman. See CONSTRUCTION.

Grants carrying incidents; ways of necessity. A grantor selling a parcel of land entirely surrounded by other lands of his, impliedly gives a right of way over his remaining lands to the parcel sold. Pettengill, 8 Allen, 1, 85 Am. Dec. 671-681, n.; Moak, Torts, 487-501; Grayford v. Moffatt, L. R. 4 Chan. 133; 5 Mews' E. C. L. 1096; Pinnington, 3 Kent, 424, n.

Assignment of debt carries remedy. Bronson; Edwards v. Kearzey; *Expressio eorum*, etc.

Eminent domain. Property need not be actually taken, under constitutions which provide it shall not be taken or damaged. Osborne & Co. v. Missouri, etc., R. R. (1892), 147 U. S. 248; Story v. El. R., R.

Injury to an incident is an injury to the principal thing. Note, 37 L. ed. (U. S.) 136.

Power to construe a contract can defeat it, or impair and destroy an obligation, as we elsewhere point out, in reference to commercial paper. Miller v. Race; Von Hoffman; *Cujus est instituere*, etc.

"Due process of law" depends upon its incidents, equal and uniform law in pleadings, procedure and evidence. The law of the land depends upon these incidents. *Sub, Salus populi suprema lex.* Power to construe pleadings, or direct procedure, can destroy any right, for the same reason that a right depends upon its remedy. Bronson; Edwards. A right without a remedy cannot exist; it is like a crime without a punishment. *Cujus est instituere*, etc.

State power cannot determine the jurisdiction of federal courts. Tyler (1893), 149 U. S. 164; Mexican Central R. R. v. Pinkney, 148 U. S. 194.

Equity. Jurisdiction of federal courts cannot be ousted by states making the cause of statutory cognizance. Sheffield Furnace Co., 149 U. S. 574.

Due process of law; jurisdiction. Lawless violence done to one in custody of a United States marshal is actionable in federal courts. U. S. v. Shipp, 203 U. S. 563 (cites Logan).

250. BOBEL v. P. (1898), 173 Ill. 19, 64 Am. St. 64-107, ext. n.; Parkins, 158 N. Y. 306, 70 Am. St. 483; Paxton Co., 45 Neb. 884, 50 Am. St. 585, 29 L. R. A. 853; Davis v. S., 7 Md. 151, 61 Am. Dec. 331-346, ext. n.; Nuendorf, 69 N. H. 557, 25 Am. Rep. 235-246, n., 1 Kent, 460, 8 Crim. Law Mag. 184, Suth. Stat. 76-101, 210, 211; Sedgk. Stat. 517-536, Cool. Const. Lim. 169-180; Crookston, 79 Minn. 283, 78 Am. St. 453-486, ext. n.; S. v. Sloan, 66 Ark. 575, 74 Am. St. 106, n. (comprehensive titles are valid; legislature is sole judge of what is properly a general or special law); 107 Ala. 444, 32 L. R. A. 520; Boorum, 60 N. J. Law, 197, 88 Am. St. 469, n.; *Expressio unius*, etc.; *Nigrum nunquam excedere debet rubrum. Cited*, § 104, Hughes' Proc.. § 61, Gr. & Rud. *Constitutional law;* title to statutes must be certain and specific; requirements of. Bobel: cases. See DeYoe, 140 Cal. 476, 98 Am. St. 73.

Revision and republication of codes; subject

Leading Cases.—250. Bobel.

of, when sufficiently expressed. Lewis, 134 Cal. 291, 86 Am. St. 257-279, ext. n., 55 L. R. A. 838-856, ext. n.; 98 Am. St. 73.

251. NOBLE v. DURELL (1789), 3 Term Rep. (D. & E.) 271, Sedgk. Stat. 212-218, 5 Mews' E. C. L. 238; 2 Wh. Ev. 958: cases; Jones, Construc. Conts. 116, End. Stat. 195-357, 362 (that a pound of butter shall contain eighteen ounces in a particular town is bad; a universal law cannot receive different interpretations at different times).

Cited, §§ 178*a*, 180, 289, 293, Hughes' Proc.

A custom contrary to a statute is bad. Houghton, 194 U. S. 89 (positive language controls—*Contemporanea,* etc., is limited); U. S. v. McDaniel, *sub,* COSTS (usage cannot alter the law); Governor, 6 Gratt. (Va.) 24, 50 Am. Dec. 95-105, ext. n.; Maher v. S.; Feather v. R., 6 B. & S. 289, 292 (118 E. C. L. R.); stated, Bro. Max. 141.

Written conditions in a power of attorney cannot be varied by oral evidence. Whart. Ag. 225, stating general rule.

Practical Construction. Maher: 255. See CONSTRUCTION.

252. P. v. TURNER (1870), 55 Ill. 280, 8 Am. Rep. 645. S. P. Oakley: 222. Cited, §§ 160, 304, Hughes' Proc.; §§ 46, 139, 289, 294, Gr. & Rud.

"The parent has the right to the care, custody and assistance of his child. The duty to maintain and protect it, is a principle of natural law. He may even justify an assault and battery, in the defense of his children, and uphold them in their law suits. Thus the law recognizes the power of parental affection, and excuses acts which, in the absence of such a relation, would be punished. Another branch of parental duty, strongly inculcated by writers on natural law, is the education of children. To aid in the performance of these duties, and inforce obedience, parents have authority over them. The municipal law should not disturb this relation, except for the strongest reasons. The ease with which it may be disrupted under the laws in question; the slight evidence required, and the informal mode of procedure, make them conflict with the natural right of the parent. Before any abridgment of the right, gross misconduct or almost total unfitness on the part of the parent, should be clearly proved. This power is an emanation from God, and every attempt to infringe upon it, except from dire necessity, should be resisted in all well governed states. In this country, the hope of the child, in respect to its education and future advancement, is mainly dependent upon the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this relation would not only tend to wither these motives to action, but necessarily in time, alienate the father's natural affections." 55 Ill. 284.

Limitations of legislative power. Millett; Taylor: 219*a*; S. v. Brown, 107 Am. St. 798 n. See POLICE POWER; CONSTITUTIONAL LAW. Oakley: 222.

Leading Cases.—

253. RISON v. FARR (1865), 24 Ark. 161, 87 Am. Dec. 52-65.

Cited, §§ 5, 273, Hughes' Proc.

Immoral, blasphemous and unchristian statute valid, if only constitutional. Donahoe, 38 Me. 379, 61 Am. Dec. 256, n.; Bennett, Baldw. 60, 74, 75, No. 1, 319 Fed. Cas.; S. v. Wrightson (1893), 56 N. J. Law, 126, 22 L. R. A. 548, n.; Suth. Stat. 85: 330; Cool. Const. Lim. 1 Bish. C. L. 496, 497; Bish. Stat. Crimes, 40; 1 Pom. Eq. 64, n. See CHRISTIANITY. Trist: 214; Oakley: 222; POLICE POWER.

Plea bad in part is bad for whole where plea is entire. Rison; 1 Chit. Pl. 546; Bissell: 42; Webb v. Martin (1662), 1 Levinz (Eng.), 48.

Demurrers must not be too broad. See DEMURRER; Bissell: 42.

"The rules which prevail in the construction and allowance of a plea in bar, are, 1st. That it is to be construed most strongly against the defendant. (Every presumption against the pleader. Dovaston; *Verba fortius,* etc.; 190 U. S. 546.) 2d. That a general plea, if bad in part, is bad for the whole. An entire contract, if void in part, is *in toto.* (Spraigue—statute; Mallan—contract; or a plea; Rison.) 3d. That surplusage will not in general vitiate." *Surplusagium non nocet; Utile per inutile,* etc.

254. BLAIR v. RIDGLEY (1867), 41 Mo. 68, 97 Am. Dec. 248-258, n., And. Am. Law; Suth. Stat. 21, Cool. Const. Lim. 40, 316.

If a law is constitutional, it is valid, although it is immoral, unjust and against natural justice. Suth. Stat. 85; § 5 (*contra*). *Conclusions of law;* facts must be averred; they will not be implied. Rushton; Dovaston; Rison.

Federal and state laws; respective spheres of each. Blair; Calder; Cummings v. State of Mo.; Logan: 249; Ashby, stated and discussed.

255. MAHER v. S. (1834), 1 Porter (Ala.) 265, 26 Am. Dec. 379-381.

Cited, §§ 178*a*, 289, 293, Hughes' Proc.

Practical construction. A construction of a statute long acted upon by the people at large will be adopted by the courts, if not in direct contradiction of its terms. *Communis error facit jus;* Cool. Const. Lim. 81-86, is of great weight. In re State Lands, 18 Colo. 359; § 255, Hughes' Proc.

Custom contrary to statutes bad. Noble, 251; End. Stat. 357-395. Violation of a trust for two hundred years is no reason for its continuance. Atty. Gen. v. Bristol, 2 Jac. & W. 321, End. Stat. 358. Bro. Max. 682. Construction of a statute long acquiesced in will not be disturbed. C. v. Posey (1787), 4 Call (Va.), 109, 2 Am. Dec. 560-564; *Contemporanea expositio est optima,* etc.; *Ita lex scripta est;* Suth. Stat. Construc. 308, 310; Sedgk. Stat. 212, 217; End. Stat. 358. Construction deduced from acts is proper, especially where contract is uncertain; where the acts done under it supplement and make certain its meaning. 1 Warv. Vend. 121; 1 Brandt,

Leading Cases.—255. Maher.

Sur. 94; Michigan Bank, 28 Vt. 200, 65 Am. Dec. 234; Cravens, 120 Ind. 6, 16 Am. St. 298, n.

Practical construction to show intent in contracts. Destrehan, 45 La. Ann. 290, 40 Am. St. 265. 4 Wigm. 2465. Boundaries fixed and acted upon, although variant from calls in a deed, control. Knowles, 58 Me. 172, 3 Gray, Cas. Prop. 297; Emery, 38 Me. 99, 3 Gray, Cas. Prop. 297; Heaton; *Falsa demonstratio,* etc. Intent in a contract controls; it prevails if ascertainable. Jones, Construc. Conts. 21; Harper; Kemble. It may be gathered from a course of dealing, when it operates as an estoppel. Moller.

General intent overrides ordinary meaning of particular words. Jones, Construc. Conts. 218, 219; Smith, Conts. 562; *Ex antecedentibus,* etc.; *Verba generalia restringuntur,* etc.

No law can be assumed to enter into a contract, if it contradicts the express terms of the writing. Jones, Construc. Conts. 29. An acre in a contract means the statute acre, and this cannot be contradicted. Paull, 4 Watts (Pa.), 402; Sedgk. Stat. 217; Noble, 2 Wh. Ev. 958; End. Stat. 362.

Practical construction of a contract by parties to it, is of great weight, if it is doubtful. Mueller. *Res ipsa loquitur; Communis error facit jus.* Stipulations in contracts; Specialties may be waived. Atlantic Ins., 3 Colo. 224, 227-228; or partnership articles. Byers, 4 Colo. 515, 523; conditions in policies. Farmers', etc. Co., 2 Colo. App. 265, of specifications of building contracts. Schaefer, 3 Colo. 15, 17. If such provisions can be annulled, then why cannot substitutes be made? Are they not made?

Practical construction of statute to show intent. Ramsey, 95 Tex. 614, 93 Am. St. 857-881, n. *Contemporanea expositio,* etc.; Ames, 111 U. S. 449 (constitution).

256. P. v. SEYMOUR (1860), 16 Cal. 332, 76 Am. Dec. 521-540, ext. n.; cited, Cool. Tax. Taxation; assessments; curative acts; limitations of statutory power. Cool. Tax. 313-323, 2d ed., 2 Desty, Tax. 115-118; Meigs, 162 N. Y. 322, 76 Am. St. 322. See TAXATION; Allen v. Jay.

Retrospective taxation forbidden. 1 Cool. Tax. 492; Cool. Const. Lim. 382. Curative acts. 1 Cool. Tax. 510. *Curative defects in tax proceedings.* 1 Cool. Tax, 508-545. Steger. *Defective assessments and curative acts.* Welty, Assess. 230, 249: cases.

257. S. v. THOMAS (1880), 47 Conn. 546, 36 Am. Rep. 98-103, n.; 1 Ell. Ev. 86. Cited, Hughes' Conts.

Cited, §§ 28, 119, Hughes' Proc.; § 294. Gr.

Power of legislature to make certain presumptions conclusive evidence. 1 Cool. Tax. 67, 506-508, 2 *id.* 1004-1017: cases. Vega Steamship Co., 75 Minn. 308, 43 L. R. A. 843; Meyer, 39 Minn. 438, 1 L. R. A. 177, 12 Am. St. 663. Missouri R. R., 64 Kan. 802 (due process of law

Leading Cases.—257. Thomas.

opposes); P. v. Cannon, 139 N. Y. 32, 36 Am. St. 668, 669, ext. n. (statute may make presumptions *prima facie* guilt); P. v. Turner, 117 N. Y. 227, 15 Am. St. 498, n.; 1 Bish. Crim. Proc. 1088-1090; Adams v. N. Y.

Tax titles cannot be made conclusive. Notes, 15 Am. St. 508; Larson, 39 Neb. 463; 42 Am. St. 595, n.; Jackson, 7 Cow. 88, 17 Am. Dec. 502-514, n., New, Eject. 117, 120; Dev. Deeds, 1347-1424 (tax deeds), Cool. Tax. 472, 2d ed.; 2 Desty, Tax. 136; Long, 13 Iowa, 28, 81 Am. Dec. 420, n.; Hurd, 3 Wash. 1; 28 Am. St. 17, n.; Marx: 126. Question of tax title must show what. 2 Cool. Tax. 1057; Welty Assess. 231.

Burden of proof shifts if defect is pointed out. Notes, 28 Am. St. 21; § 119, Hughes' Proc.

Legislative prescriptions of evidence; limitations. S. v. Beach (liability of insolvent banker for receiving deposits), 258.

Possession of stolen property cannot be made conclusive. Kirby v. U. S. Cr. Rep. 330. R. v. Partridge: 190.

258. S. v. BEACH (1896), 147 Ind. 74, 36 L. R. A. 179; 1 Ell. Ev. 86.

Cited, §§ 147, 269, 294, Gr. & Rud.

Legislatures may prescribe what shall constitute prima facie proof of guilt. Phelps: 191; Thomas: 257. Meadowcroft v. P. (1896), 163 Ill. 56, 35 L. R. A. 175; Adams v. N. Y.; S. v. Thomas, 144 Ala. 2 L. R. N. S. 1011-1012: cases; 113 Am. St. 17-20.

"Due process of law" proceedings essential; its elements required and protected. Murray: 219; Cryps v. Baynton; Cruikshank: 232 (there must be sufficient allegations).

259. HUNSAKER v. BORDEN (1855), 5 Cal. 288, 63 Am. Dec. 130-132; Laws. Conts. 119.

Cited, §§ 29, 300, 348, Hughes' Proc.; §§ 63, 64, Gr. & Rud.

Sovereignty; right to sue; cannot be sued against is consent.

And. Dic.: "Suitor"; Ayers, 123 U. S. 443, 505: cases; Russell v. U. S. (1901), 182 U. S. 516, Sto. Pl. 69*a*, Ans. Conts. 104 n., Bish. Conts. 989, Laws., Beach. Pub. Corp. 739-775, n.; Cool. Const. Lim. 17: cases; Belknap: 260; Carr v. S., 127 Ind. 204, 11 L. R. A. 370, n. See Chisholm; 34 Am. Law. Rev. 689-708: cases (what is a suit against a state). See SOVEREIGNTY.

Petition of right; procedure. Pering, 2 M. & W. 837, 5 D. P. C. 750, M. & H. 223, 8 Rul. Cas. 268, n.

United States can only be sued by its consent. It has not consented to be sued in tort. Overholser, 68 Ohio, 263, 96 Am. St. 658. See ELECTION OF REMEDIES.

The U. S. can sue a state, but a state can not sue the U. S. Kansas v. U. S., 204 U. S. 331.

260. BELKNAP v. SCHILD (1896), 161 U. S. 10. *Government as a party to suits.* No suit can be maintained or injunction granted against the United States unless

Leading Cases.—260. Belknap.

expressly permitted by act of congress. *Rex non potest peccare.* Harlan and Field, JJ. dissenting. See U. S. v. Lee (1882), 106 U. S. 196, stated and explained in Belknap (state must be technically a party—a party on the record to claim the exemption; the agent or officer of the government may be sued); 2 Tucker, Const. Law. 783, 791.

Government as a party to contracts. Laws. Conts. 117-120; International Co., 194 U. S. 601 (states and explains Belknap and Lee cases).

261. NEEDHAM v. THAYER (1889), 147 Mass. 536, 18 N. E. Rep. 429, 7 New Eng. Rep. 159; Brown, Jurisdic.

Cited, p. 15; §§ 5, 31, 51, 52, 56, 57, 62, 63, 86, 147, 150, 152, 167, Hughes' Proc.; §§ 13, 18, 70, 108, 240, Gr. & Rud.

Domestic judgments may be collaterally attacked for fraud. Belcher, 53 Cal. 635; Starbuck; Hauswirth; *Ex dolo malo,* etc.; Windsor; Harshey; Van Fleet, Coll. Att., p. 437; Little Rock, etc. Co., 61 Ark. 354, 54 Am. St. 448; Dobbins, 113 Ind. 54, 3 Am. St. 626; Merriman, 105 Cal. 403, 45 Am. St. 50, 30 L. R. A. 786-802, n. See cases, 31 and 32 L..R. A., and n.; Furman; Weeks, Att'ys, 204; Bailey, Jurisdic., citing Needham; Dunham, 162 Ill., 589, 95 L. R. A. 70 (fraud vitiated a judgment); Thompson, 18 Wall. 457; Hollinger, 138 Ind. 363, 46 Am. St. 402, n., 24 L. R. A. 46 (fraud must be promptly complained of); 3 Encyc. Pl. & Pr. 607-632. See *Quod ab initio,* etc.

Equitable jurisdiction over judgment. Earl of Oxford's Case (1616), 1 Ch. Rep. 1 (13 Jac. 1), 2 Lead. Eq. Cas. (W. & T.) 1291-1416, ext. n.; 21 Eng. Reprint, 485; Marine Ins. Co. v. Hodgson (1813), 7 Cranch (U. S.), 332, 3 L. ed. 362, Laws. Lead. Cas. Eq. 129 n.; Kinnier, *sub,* Hanford: 86; Graver: 603; Dimes: 176. Vacating judgments for fraud is an inherent power of courts, irrespective of statutory power. Furman; Graver. Judgment resting upon perjury may be set aside. Barr; Graver. Void judgment will not be enjoined. Camp, 69 Vt. 268, 60 Am. St. 929, n. See St. Louis R. R., 138 Mo. 533, 60 Am. St. 565, n.

Fraud vitiates a record for res adjudicata purposes. This is a leading rule of *res adjudicata.* See COLLATERAL ATTACK. Service of process; defects in. Sanford v. Edwards; McClung, 47 W. Va. 150, 81 Am. St. 785, n.

A judgment is an entirety, and if void in part it is void in toto. Watson, 19 R. I. 218, 61 Am. St. 768, n. (process must be served on all defendants); Enos, 12 Ill. 255.

Jurisdiction may be inquired into. Mills: 57; Starbuck, 176 U. S. 356: cases; Thompson; Windsor; McElmoyle: 56.

The first covenants of society have often been overlooked by courts, with respect to their records. But a liberal rule was well introduced in the federal courts in Mills v. McElmoyle, and fully maintained in German, etc., 192 U. S. 125, 128; Andrews, 188 U. S. 14 (S. C. 176 Mass. 92, 93); also in *Galpin, Pennoyer, Windsor* and *Haddock;* and similar views are maintained in Ferguson, Furman, Needham, Graver. *Ex dolo malo,* etc. See *Res Adjudicata.*

Courts of exclusive jurisdiction are a subject of review. Frobreck, 45 Or. 13, 106 Am. St. 634-647.

Leading Cases.—261. Needham.

262. FURMAN v. FURMAN (1897), 153 N. Y. 309, 60 Am. St. 629-663, ext. n.; § 28. Vacating of judgments in furtherance of justice may be after time fixed by statute. *Sub,* Needham; Larson, 100 Iowa 110, 62 Am. St. 544, n.; Hauswirth: 51.

And for negligence of attorney. Peterson, 110 Iowa, 19, 80 Am. St. 261-271, ext. n. O'Brien, 139 Cal. 220, 96 Am. St. 105-111 n.

Courts have inherent powers. Sub, Yates, *In re;* Graver; Needham; Dimes; Kollock; Schwam, 179 N. J. 35, 103 Am. St. 382.

Equitable relief against judgments. Ferguson; Hauswirth; Needham.

For perjury. Barr; Wonderly; Graver; *Ex dolo malo.*

A void judgment may be set aside at any time, and by the court *sua sponte.* White, 41 Ore. 324, 93 Am. Dec. 732.

263. STARBUCK v. MURRAY (1830), 5 Wend. 148, 157, 21 Am. Dec. 172-181, n., Van Fleet, Coll. Att. 432, 1 Wh. Ev. 796, 123 N. Y. 445, 20 Am. St. 77, Mech. Ag. 810, 2 Sm. Lead. Cas. 801 (side p. 683, 7th ed.), 855, 8th ed., Bailey, Jurisdic. §§ 5, 12, 31, 51, 72, 77, 86, 120, 123, 147, 152, 167, Hughes' Proc.; §§ 13, 96, 239, Gr. & Rud.

A court cannot make a record without authority from parties and allegations. Ferguson; Windsor: 1. Cohens; Pollard, 13 Wis. 569; Bailey, Jurisdic. 172, 176 U. S. 356.

Pleadings must present a subject-matter for recovery or of defense. Starbuck; McLaughlin: 31; Eddy Co.: 137; R. v. Carlile (1831), 2 Barn. & Adol. 362-369 (22 E. C. L. R.), 11 Rul. Cas. 1-16, n. (no allegation can be made against a record). See Bro. Max. 329, 342. Jurisdictional inquiries may be raised at any time. Thormann, 176 U. S. 350; Thompson v. Whitman; Needham; *Fabula,* etc.; S. v. Baughman: 268; Harrigan v. Gilchrist, *sub,* MAGNA CHARTA; Story.

264. FERGUSON v. CRAWFORD (1877), 70 N. Y. 253, 26 Am. Rep. 580, 601; Rood, Garn. 88, Ald. Jud. Writs, 133, n., 7 Am. St. 714, Bailey, Jurisdic., Mech. Ag. 810, Ror. Interstate Law, 143, 1 Wh. Ev. 796, 797, 803; Reynolds, 30 Kan. 106, 46 Am. Rep. 86.

Cited, p. 16, § 5, Hughes' Proc.; §§ 13, 70, 96, 108, Gr. & Rud.

Ferguson stated: A mortgagee sought to foreclose his mortgage. To his claims it was pleaded he was estopped by a plea of *res adjudicata,* averring that in a prior foreclosure suit to the mortgaged property he was a defendant, and appeared by his attorney, Mills. No reply was filed to these allegations. At the trial the record

Leading Cases.—264. Ferguson.

in the prior suit was offered in evidence to plead the estoppel of record. This record was relied upon as an absolute verity. But the court admitted evidence showing that Mills did not appear for the mortgagee, and that his written appearance was a forgery; that the recital in the record of the appearance was founded upon a forgery. *Debile fundamentum, fallit opus.* Upon this record the court consulted many authorities and stated much that relates to "due process of law"—*Audi.* Borden: 267; Bloom: 266; Starbuck: 263; Williamson: 65 and Mills: 57 were cited, discussed and approved. *Starbuck* and *Bloom* are stated at length.

Cases holding that the remedy was against the attorney were discussed and distinguished. *Denton v. Noyes* (1810), 6 Johns. 296 (attorney appearing without authority is liable but his record is conclusive. Seo Harshey v. Blackmarr); 1 Smith, Lead. Cas. (Hare & W.) p. 842, marginal page cited.

A reply to new matters is unnecessary. See Munday: 79; Indianapolis, etc.: 223; *Ita lex,* etc.; Kollock.

Defenses not pleaded may nevertheless be available. Bridgeport Bank, 28 Conn. 557; stated and approved, 70 N. Y. 268.

Defenses need not be anticipated. "One should not jump the stile before he gets to it," p. 269.

It is well to observe that McFarquhar, for whom the false record was made, was not a party to this case. Still the court declared his decree of foreclosure a nullity. See Williams: 93.

Equity; attaching for one purpose, attaches for all. Brugger: 162: cases. Harrigan v. Gilchrist, *supra.*

One's right to a full fair *bona fide* opportunity to be heard is above interests and rights founded upon fraud. *Ex dolo malo non oritur actio.* The right to "due process of law" cannot be swept away or defeated by conspiracy and chicane. That guarantee must be first satisfied before rights of purchasers and equity claimants can be defended. Where one of two equally innocent persons must suffer from the fraud of a third, he who first trusted must first suffer. See *Audi alteram partem:* §§ 51-78, Hughes' Proc.

Recital of jurisdictional facts in a judgment is not conclusive; they may be collaterally attacked. Ferguson. And by evidence *aliunde.* James, 99 Cal. 374, 37 Am. St. 60, n.; Hauswirth: 51; Mastin, 19 Kan. 458, 27 Am. Rep. 149; Needham: 261; Belcher; Santa Clara, 18 Fed. 385, 398-406 (Field J.), 13 Am. & Eng. R. R. Cas. 182-247: *Ex dolo;* "Fraud vitiates all into which it enters"; *Audi;* Kingston's Case; Dennett: 145. See DUE PROCESS OF LAW; Cool. Const. Lim. 27: cases. They are only *prima facie* true. Bickerdike, 157 Ill. 95, 29 L. R. A. 782, 2 Encyc. Pl. & Pr. 596; Bailey, Jurisdic. 172.

Leading Cases.—264. Ferguson.

Presumptions from judgments. *Omnia præsumuntur rite,* etc.: Van Fleet, Coll. Att. Judg. 805-857; Arthur, 15 Colo. 147, 22 Am. St. 381, n., 10 L. R. A. 603; Adams, 95 Mo. 501, 6 Am. St. 74, n.; Freem. Judg. 124; Kent, 262, n.; Eichoff, 107 Cal. 42, 48 Am. St. 110; Hahn v. Kelly (liberal rule), 101 St. 993-998.

The whole record will be inspected and jurisdictional recitals will be limited by other parts of the record. Laney, 105 Mo. 355, 24 Am. St. 391; Adams v. Cowles, *supra; Verba generalia restringuntur,* etc.; Bailey, Jurisdic. 185. *Judgments and judicial records.* 1 Wh. Ev. 758-841; Kingston's Case; *Consensus,* etc.; Bailey, Jurisdic. 136-286.

A judgment establishes a right, and not the facts upon which it is founded. Cromwell: 26; Aspden; Wright: 28. See Voorhees: 119.

A judgment or decree to be affected by loose file papers, either disputed or sustained by them, has many objections. If they contradict the decree and they are lost then the invalid or uncertain decree may be validated or made certain. *Verba relata hoc maxime,* etc. Decrees may contain surplusage. *Utile per inutile,* etc.

Clerks' unnecessary recitals are surplusage. Hobbs v. S. (1892), 133 Ind. 404, 18 L. R. A. 774. *Presumptions from recitals in judgments as to service of process.* Ald. Jud. Writs, 131-140. *Judicial recital of facts is not conclusive.* See *Dictum.*

Parties only can create and present jurisdictional facts and issues authorizing judicial power to act. Starbuck: 263; Windsor: 1. Not even consent can confer jurisdiction of subject-matter. Cooper v. Reynolds. See DIVISION OF STATE POWER; *De non apparentibus,* etc.

Equitable relief from judgments. Harshey; Dimes: 176; Needham: 261; Hauswirth: 61; Hayne Appeal, 337-342; *Ex dolo malo,* etc.; Crown.

265. BARR v. POST (1900), 59 Neb. 361, 80 N. W. 1041, 80 Am. St. 680.

Cited, §§ 5, 42, 52, 86, 147, Hughes' Proc.

Perjury is a ground for vacating a judgment founded upon it. Secord, 61 Neb. 615, 87 Am. St. 474, n.; Munro, 55 Neb. 75, 70 Am. St. 366; Graver: 103: cases. *Contra:* Pico, 91 Cal. 129, 25 Am. St. 159-171, ext. n., 13 L. R. A. 336-340, n.; Green, 2 Gray, 361, 61 Am. Dec. 454, n.; U. S. v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Camp, 69 Vt. 286, 60 Am. St. 929, n.; Graver.

It is a ground for granting a new trial. Fabrilius v. Cook (1765), 3 Burr. (Eng.) 1771; stated, 25 Am. St. 166: *contra* cases; 11 Mews' E. C. L. 510; Freem. Judg. 489: cases, 4th ed.

Relief from judgments. See Needham; 19 Am. Dec. 603-612; 23 Am. St. 104-119 (what is collateral attack upon judgment).

266. BLOOM v. BURDICK (1841), 1 Hill (N. Y.), 130-143, 37 Am. Dec. 299, 79 Am. St. Rep. 82 800; Brown, Jurisdic.,

Leading Cases.—266. Bloom.

Bailey, Jurisdic.; Van Fleet, Coll. Att.; Suth. Stat.; Stated, 1 Sm. Lead. Cas. 835, 5th ed., *id.* 1014, 6th ed., 1119, 7th ed., 1131, 8th ed., 2 Sm. Lead. Cas. 1019, 9th ed.; *cited*, Mech. Ag. 585, Wap. Attach. 276, 314, 330, Wap. Proceed. In Rem, 1 Wh. Ev. 63, note, Crepps, 1 Sm. Lead. Cas. 2 Kent, 426; Freem. Judg. *Cited*, §§ 20, 51, 58, 70, 72, 88, 120, 130, 133, 143, 158, 179, 180, 186, 261, Hughes' Proc.

Jurisdiction; elements. See *Audi.* Superior and inferior courts; distinctions. Bates: 225; Harrigan v. Gilchrist (Wis.), *supra;* JURISDICTION.

Statutory authority by which a man may be deprived of his estate, must be strictly pursued, and exactly as an agent must act within the "scope of the agency," the "range of the business," and according to the authority conferred to transact the particular act. Ransom: 122: cases; Thatcher; Deputron.

Jurisdictional facts will not be presumed nor supplied by intendment; they must affirmatively appear. Cruikshank: 232; Hannah: 128. The presumption of regularity will not supply them. Dovaston: 217.

If an account is presented its effect is not destroyed by calling it an inventory. *Falsa demonstratio; Ut res magis valeat*, etc.; *Præsentia corporis.*

One document may answer the double purpose of an account and an inventory; and an inventory made and presented at the time the petition for an order of sale is filed, may be treated as an account and give the court jurisdiction to the same extent as a separate account containing the same matter. Liberal construction is applied to uphold the proceeding.

Description of land in an order of sale, as "ninety-one acres of the south-west corner of lot number eleven," is not fatally defective if the intestate owned that number of acres and no more in the lot named. *Certum est quod certum reddi potest; Ut res magis valeat quam pereat*, was most liberally applied. Bloom.

A surrogate court is of inferior jurisdiction—a mere creature of the statute. Persons claiming under its orders must show affirmatively that it obtained jurisdiction to make them by pursuing the forms prescribed by statute. Harvey: 123; Mohr: 68.

Record must show jurisdictional facts in statutory proceedings. Gardner, 100 Mo. 269, 18 Am. St. 548, n., Wap. Attach. 330, Wap. Proced. In Rem, 571-572.

Notice of proceedings essential. Pennoyer: 58; *Audi*, etc.; Borden; Cooper v. Reynolds; Crepps: 43; notes, Smith, Lead. Cas., *supra.* Notice of appearance indispensable. 2 Smith, Lead. Cas. 955, 8th ed., 801 (side p. 683), 7th ed.

Court exercising statutory powers and jurisdictional facts *appearing* to be absent, its proceedings are void. Bloom; Galpin: 63, 64; Dorrance, 67 Conn. 1, 52 Am. St. 266, n. (sale of a defendant's estate); Mohr: 68; 2 Smith Lead. Cas. 1019, 9th ed.

267. BORDEN v. FITCH (1818), 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; stated, Brown, Jurisdic., Bailey, Jurisdic., 2 Kent, 109, 261, Savacool; *cited*, Mech. Ag. 585, Bigl. L. C. Torts, 345, Bigl. Fraud, 178, 1 Wh. Ev. 795, Wap. Attach., Cool. Const. 27, 495, notes, Crepps, 1 Sm. L. C. *q.v.*, Black, Freem. Judg. *Cited*, §§ 5, 12, 22, 29, 51, 52, 58, 72, 77, 86, 120, 123, 147, Hughes' Proc.; §§ 13, 96, 220, 268, Gr. & Rud.

A divorce obtained against a non resident wife, not personally served with process, but only by publication, is void. Borden; *Ex dolo malo*, etc.; Needham; Pennoyer; 2 Kent, 109; Haddock.

Statutory proceedings; record must show jurisdictional facts. Ricketson: 59; Crepps; Bloom; Piper: 114; *Audi*, etc.

Notice is essential for validity of judicial proceedings. Notes, Crepps, 1 Smith, L. C. 835, 5th ed., *id.* 1014, 6th ed., 1119, 7th ed., 1131, 8th ed. *Audi* is ably argued at those pages. Windsor: 1; Pennoyer: 58.

False and sham allegations inducing a judgment or decree vitiates it. Borden; Graver; Wonderly. *Cf.* Rensberger v. Britton, 31 Colo. 77-89 (a sham plea of *res adjudicata* upheld and considered). *Fabula;* S. v. Baughman: 268; Haddock.

Jurisdiction; its elements; sister state judgments. Mills: 57. See JURISDICTION.

268. S. v. BAUGHMAN (1882), 38 Ohio St. 455, 459. *Cited*, p. 11, §§ 5, 13, 19, 21, 28, 34, 35, 42, 45, 51, 90, 92, 100, 120, 123, 133, 141, 155, 203, 204, 276, 278, 329, 349, 353, Hughes' Proc.; §§ 70, 93, 115, 119, 122, 152, 157, 292, Gr. & Rud.

Fictitious cases do not bind. Ex facto oritur jus; Ex dolo malo non oritur actio; Watkins v. S.; S. v. Conkling; Wonderly: 102; Graver: 103.

"A case is never concluded against a judge," in divorce law. See MARRIAGE (connivance at divorce); Bro. Max. 329, n., 342; Austin R. R.

Parties and allegations essential for a sentence. Williams v. Eggleston: 94; *De non apparentibus*, etc.; Campbell v. Porter; *Fabula*, etc. See STORY.

"A judgment or sentence is a judicial determination of a cause agitated between real parties; upon which a real interest has been settled. In order to make a real sentence, there must be a real interest, a real argument, a real prosecution a real defense, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit; there is no judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question."

Argument in Kingston's Case, 20 How. St. Tr. 478, 479; adopted by Lord Brougham in Bandon v. Becher (1835), 3 Cl. & Fin. 510, 6 Eng. R. 1517 (instructive case); Bro. Max. 329, n.

Leading Cases.—268. Baughman.

Courts are not concluded by fictitious suits. Wonderly; Graver: cases. Collectively consider the Bandon, Beaumont, Seabury, and White v. Bluett Cases. There are limits of jurisdiction; which can only attach to real *bona fide* matter. *Fabula non judicium.* See JURISDICTION; due process of law requirements require essential ingredients. *Audi*; Murray; Taylor: 219*a*.

Replying to a sham and mythical plea of *res adjudicata* cures objection to it. Rensberger v. Britton (1903), 31 Colo. 77-89.

268a. WELTMER v. BISHOP (1902), 171 Mo. 110, 65 L. R. A. 584. *Cited,* §§ 13, 15, 22, 27, 30, 42, 87, 121, 156, 349, 353, Hughes' Proc.; §§ 52, 70, 95, 100, 119, 122, 157, 169, 225, 237, 241, 253, 268, 292, 309, Gr. & Rud.

Judicial notice. Courts are not required to give credence to testimony that would falsify well known laws of nature.

"The business of pretending to heal absent patients by supernatural powers without medicine or surgery is fraudulent and not protected by the law against libel, although many persons claim to have been benefited by the treatment." Seabury: 281; *Fabula,* etc.

The subject-matter merging in a judgment may afterward be inquired into to see if it was such as should have been considered or adjudicated. Andrews v. Andrews: cases (citing McElmoyle); Wonderly; S. v. Baughman: 268; Beaumont: 367; R. v. Wheatley: 19: cases. See SUBJECT-MATTER. To illustrate, if a claimant stated he was the original author of the Ten Commandments, or the Lord's Prayer, or Magna Charta, or the Declaration of American Independence, and that a defendant had pirated them, the admission of such allegations by the latter, thereby permitting a judgment thereon, would not foreclose inquiry into the merits of the controversy. If such a judgment was set up to estop persons in privity with the above confessing defendant, they would have the right to show there was no real or *bona fide* controversy or subject-matter. See *In pari delicto,* etc. In this connection it seems instructive to observe that an *amicus curiæ* might properly advise the court of such a proceeding; it is his duty to do so. Lawyers are not supposed to view with serenity the degradation of jurisprudence, and the degenerate exercise of state power for the establishment of absurd mockeries. Lange: 159; Wonderly: 102; S. v. Baughman: 268; *Fabula non judicium.* See Rensberger; Texas R. R. v. Humble. For such needs of protection pleadings must be required. They cannot be waived.

Frustra legis auxilium invocat, qui in legem committit: "He seeks the aid of the law in vain who offends against it." He must come into court with clean hands.

Obviously false and impossible things are not to be countenanced and enforced as valid merely because some one happened to swear to them or to admit or confess them. Præsentia Corporis.

Leading Cases.—268a. Weltmer.

269. WATKINS v. S. (1879), 68 Ind. 427, 34 Am. Rep. 273-276, Bish. C. L. 1010. *Cited,* §§ 120, 123, 136, 150, 156, 353, Hughes' Proc.

One cannot prosecute himself. A real party in interest essential. One committing a crime cannot complain against himself and be fined anything less than a maximum fine, and plead such a proceeding against a real prosecution. Watkins. Fraud vitiates a prosecution. 3 Gr. Ev. 38; *Ex dolo malo,* etc.; *Nemo cogit in seipsum:* No man acts against himself. Bro. Max. 216. *Nemo debet esse judex.* Fraud cannot become the basis of any advantage. *Ex dolo malo,* etc.; Collins v. Blantern; Wonderly. See *Res adjudicata.*

270. CALIFORNIA v. SAN PABLO R. R. (1893), 149 U. S. 308, 37 L. ed. 747: cases.

Cited, §§ 15, 21, 122, 147, Hughes' Proc.

Dead issues will not be considered on appeal. Courts will only act where there are parties and allegations or issues and a real controversy existing. Graver; Bro. Max. 329, n.; Elgin, 106 U. S. 578. *Causes must be real and bona fide;* and they must appear from allegations. Campbell: 2; Harrigan, sub, MAGNA CHARTA. CAUSE OF ACTION.

Courts are created to protect injured persons only. They will neither make nor declare disputes, and pass upon these—they have no such power; nor will they allow false, sham and fictitious pleadings. Graver: 103: cases; Moffatt, 112 U. S. 24; P. v. McCumber: 110; Cohens: 244.

One cannot appeal from a discharged judgment. S. v. Conkling, 54 Kan. 108, 45 Am. St. 270-274, n.: cases; American Book Co.

Actual controversies only decided. Floyd, 24 Colo. 489; Bro. Max. 329, n., 339; Wonderly: 102; *Fabula.*

One cannot prosecute himself. Watkins v. S.

Fraud vitiates a prosecution. 3 Gr. Ev. 38.

Ex dolo malo; Bro. Max. 216. Fraud cannot become the basis of any right or advantage. *Fabula.*

271. S. v. CROTEAU (1849), 23 Vt. 14, 1 Lead. Crim. Cas. (B. & H.) 363-433, 64 Am. Dec. 90-119, n.; S. v. Burpee (1892), 63 Vt. 1-34, 36 Am. St. 775-802, 19 L. R. A. 143-157, n., 9 Am. Cr. Rep. 536-562 (overrules S. v. Croteau), 156 U. S. 86; stated, 156 U. S. 72, 19 L. R. A. 145; *cited,* Cool. Const. Lim. 396, 2 Thomp. Tri. 2140-2149, 1 Bish. Crim. Proc. 452, 461 (joinder of misdemeanors); *id.* 982*b*, Clark, Crim. Proc. 174-176.

Cited, §§ 39, 41, 67, 89, 90, 99, 126, Hughes' Proc.; §§ 57, 63, 169, 170, 278, 294, Gr. & Rud.

Juries; province of, in criminal cases. In criminal cases juries try causes. A judge cannot direct a verdict. U. S. v. Taylor (1882), 11 Fed. 470, 3 Crim. Law Mag. 552. See U. S. v. Wilson (1830), 1

Leading Cases.—271. Croteau.

Baldwin, 78-100; stated, Cool. Const. Lim. 397; U. S. v. Morris (1851), 1 Curtis, C. C. Rep. 23, Gt. Opin. Gt. Judges, 551, 136 U. S. 65-75, 2 Am. Law Reg. 348; § 39, MAGNA CHARTA; *Schnier v. P.* (1859), 23 Ill. 17, 25, 26 (aff'g S. v. Croteau); R. v. Audley (1631), 3 How. (Cobb.) St. Tri. 402. *Sparf v. U. S.* (1895), 156 U. S. 51-183, 39 L. ed. 343-389, 10 Am. Cr. Rep. 168-227 (judge cannot direct jury to convict of crime; one can only be *tried* by a jury of his peers. MAGNA CHARTA.) This is an exhaustive case and reviews the English and American cases; cited, §§ 39, 41, 89, 99, 126, Hughes' Proc.; §§ 63, 170, 278, 294, Gr. & Rud. R. v. Parish (1837), 8 Car. & P. 94 (34 E. C. L. R.); stated, 156 U. S. 96 (jury can only pass on facts in criminal cases); Parmiter, 6 Mees & Wels. 105, 106 (libel case; same rule); Kane v. C. (1879), 89 Pa. 522, 1 Crim. Law Mag. 4757, n., 33 Am. Rep. 787-792; R. v. Dean of St. Asaph (1784), reported in note (1793), 3 T. R. 428, stated in *Croteau, Burpee* and *Sparf* cases, 156 U. S. 77, 10 Am. Crim. Rep. 196.

From all standpoints save one, but a dogma is involved in these extended discussions. The principle involved is only important in trial procedure; for it is necessary to comprehend how the court and how the jury function shall be addressed, and to what extent the court may regulate the conduct of the trial and enforce its ideas of decorum. In all other particulars the results are the same. For, whatever the court may instruct or wish, if the jury acquits, that ends the case. *Directing an acquittal.* 1 Bish. Crim. Proc. 977.

Misdemeanors; distinct transactions may be joined, but not felonies. S. v. Croteau; 1 Bish. Cr. Proc. 452, 461; Ben, 22 Ala. 9, 53 Am. Dec. 234-250, ext. n.; C. v. Shutte (1889), 130 Pa. 272, 17 Am. St. 773, n.; Hunter, 79 Pa. 503, 3 Cent. L. J. 129 (Pa. rule); Brugger: 161 (same rationale under codes); 65 Am. St. 484, 485, Bliss, Pl. 116; 71 Am. St. 213, n.; R. v. Castro.

Evidence of distinct misdemeanors may be given if within the statute of limitations. S. v. Croteau. *A verdict of acquittal bars the crown.* R. v. Duncan, *post.* New trials not given the prosecution in criminal cases. S. v. Croteau.

Bills of exceptions will not lie in behalf of the state in criminal cases, because of former jeopardy guarantee. S. v. Croteau; P. v. Corning; C. v. Cummings; R. v. Duncan, *post.*

In civil cases. Chicago R. R., 52 Ill. 296; Walker, 52 Ill. 347, 351. See *Ad quæstionem facti,* etc.; Max.: 4; §§ 89-103, Hughes' Proc.; for rule in civil cases. Nelson (courts must construe contracts). Constitutional right of. Steck v. Colo. etc.; S. v. Whit (1858), 5 Jones Law (N. C.), 224, 72 Am. Dec. 533-549, ext. n.

Reading law reports to jury. S. v. Whit (judge and jury; domain of each); Askew v. S. 94 Ala. 4, 33 Am. St. 83, n.; S. v. Whitmore, 53 Kan. 343, 42 Am. St. 288-295, ext. n. (permissible).

New trial after a conviction for felony is permissible. C. v. Green (1822), 17 Mass. 565, 1 Lead. Crim. Cas. (B. & H.) 554-592; 1 Bish. C. L. 110, 972, 998, 1003, Whart. Ev. 398.

Separation of jury; when this operates as an acquittal. R. v. Woolf (1819), 1 Chit. 410 (18 E. C. L. R.), 2 Barn. & Ald. 462, 1 Lead. Crim. Cas. (B. & H.) 496-512; Thompson, 155 U. S. 271; Van Fleet, For. Adj. 641-658.

Only a convicted person can appeal and seek a review; the crown, state or prosecution cannot. C. v. Cummings (1849), 3 Cush. (Mass.) 212, 1 Lead. Crim. Cas. (B. & H.) 604-612, 50 Am. Dec. 732, 1 Bish. C. L. 992. *P. v. Corning* (1848), 2 N. Y. (2 Comstock) 9, 1 Lead. Crim. Cas. 599-612, n., 49 Am. Dec. 364-369, 19 L. R. A. 342; 1 Bish. C. L. 1022, 1024; S. v. Cox (1877), 67 Mo. 46, 3 Crim. Law Rep. (Hawley), 350; P. Miner, 144 Ill. 308, 19 L. R. A. 342-348, n.; S. v. Lee (1894), 65 Conn. 265, 48 Am. St. 202-215, n. *R. v. Duncan* (1881), 7 Q. B. Div. 198, 14 Cox, C. C. 571: cases. *R. v. Scaife* (1851), 17 Q. B. (A. & E., N. S.) 238, 79 E. C. L. R., 2 Den. C. C. 281; 1 Bish. C. L. 1001, 3 Gr. Ev. 10; 4 Mews' E. C. L. 1898. § 99, Hughes' Proc.

272. R. v. GIBSON (1887), 18 Q. B. D. 537, 16 Cox, C. C. 181.

Cited, § 239, Gr. & Rud.

Evidence; practice; incompetent evidence vitiates. Only legal evidence is to be admitted. Admission of incompetent evidence is error, although it may be cumulative in character, and notwithstanding there is sufficient evidence in the record to justify a finding. R. v. Gibson; *De minimis* does not apply here. R. v. Paul (1890), 25 Q. B. D. 202, 17 Cox, C. C. 111.

Judge and jury; province of. Courts have no right to discuss and observe upon sufficient evidence. This is an invasion—usurpation—of the province of the jury—is material error. Verdicts and findings will not be allowed to stand which are not founded upon legal evidence. To tolerate this would be to recognize the office of the court to decide in what way the jury ought to have acted upon the error before them which was legally administered. S. v. Croteau: 271: *Ad quæstionem facti.*

Production of documents; original writings required; telegrams. If possible, the original telegram handed in for transmission must be produced. R. v. Regan, 16 Cox C. C. 203; Queen's: 53*a*; C. v. Kane: 183: cases.

273. ASHBY v. WHITE (1704), Ld. Raym. 938, Holt, 524, 6 Mod. 45, 1 Brown, P. C. 47, 6 St. Tri. 89, 1 Sm. Lead. Cas., 455-489 (7th ed.), 464-521 (9th ed.), 240-298, 11th ed. (reviews English cases), 1 Rul. Cas. 521 (action; right of, *id.* 521, 522, Mech. Cas. Dam. 8,

Leading Cases.—273. Ashby.

Pattee, Torts, 41, 53, Gt. Opin. Gt. Judges 23, cited; stated in Blair: 254, 41 Mo. 68, 97, and in Stockdale; Suth. Dam., 13 Cyc. 13, 6 Mews' E. C. L. 117, 1 Wat. Tres. 13, n., Cool., Bish., Add., Torts, Wood, Nuis., 1 Suth. Dam. 9-16, 1 Sedgk. Dam. 29, 32, 96, Shear Neg., Gr. Pub. Pol., Gould, Waters, 1 Bish. C. L. 237; Angle, Dill. Corp., Beach, Corp. (immunity afforded officers); Webb, 2 Sumn. 192, No. 17,322 Fed. Cases (damage to watercourse, *citing* Marzetti, a bank check case.)

Cited, §§ 5, 55, 56, 126, 347, Hughes' Proc.

There is no wrong without a remedy, is a principle of almost universal application. Marbury: 142. Ashby is widely cited to sustain that principle. The facts were: A. was a lawful elector and had a right to vote, but his ballot was rejected by W., a judge of the election. For this A. sued W. Although the candidate A. offered to vote for was elected, still he recovered upon the ground that there is no wrong without a remedy.

S. P., *Ubi jus ibi remedium.* Bro. Max. 191-211. *In casu novum,* etc. Remedies afforded without precedents: *Winsmore v. Greenbank* (1745), Willes, 577, Bigl. L. C. Torts, 328-340, ext. n.; Ames, Cas. Torts, 589; *Kujek v. Goldman* (1896), 150 N. Y. 176, 55 Am. St. 670, n.; 34 L. R. A. 176; see *Pollard v. Lyon*; Deceit. *Lynch v. Knight* (1861), 9 H. Ld. Cas. 577; 2 Smith, Cas. Torts, 744; Sedgk. Lead. Cas. Dam. 725; 8 Rul. Cas. 382; *Lumley v. Gye* (action, right of); *Sasportas v. Jennings;* 1 Wat. Tres. 13, n.; Cool. Torts, 71 (duress case); *Williams v. Bayley* (1866), L. R. 1 H. L. Cas. 206-222, 6 Rul. Cas. 455 (duress case); Guetzkow, 96 Wis. 591, 65 Am. St. 83, n. (duress case); Bevard, 18 Md. 479, 81 Am. Dec. 618, Erwin, Cas. Torts, Bailey, Jurisdic. 910 (judges of election not liable, as held in Ashby.

Ubi jus, etc., is the corner-stone of our jurisprudence. Marbury. With *Ignorantia legis neminem excusat* and *Necessitas privilegium,* etc., it is a great underlying fundamental. It is a ground and rudiment of law; it is a part of the prescription. It is interwoven with the conserving principles of procedure.

Absence of a precedent is no ground for declining jurisdiction to protect a right. Piper v. Hoard (1887), 107 N. Y. 73, 1 Am. St. 789 (child may recover for fraud committed upon mother). See Precedent; Stare Decisis.

Injunctions will protect from trifling deprivations of rights to water courses. Webb, *supra. Every right at common law or by statute gives a remedy.* Suth. Stat. 427; *Expressio eorum,* etc. *Ubi jus.*

274. MOSTYN v. FABRIGAS (1774), 1 Cowp. 161, 1 Sm. L. C. 1027-1078, 11th ed. (reviews English cases), Brown, Jurisdic. Tucker, Const. 382, 4 Mews' E. C. L.; Suth. Stat. 18, 49 L. R. A. 78.

Local and transitory actions; venue. Morris, 78 Tex. 17, 22 Am. St. 17-27; Williams, 52 La. Ann. 1417, 78 Am. St. 390 (torts), Suth. Stat. 12.

Leading Cases.—274. Mostyn.

Mostyn, by Mansfield, is widely cited and discussed, and lately, too. A Wisconsin citizen owned land in that state which was damaged by an interstate railroad. He went into Minnesota and sued there for the benefits of a different rule, for trespass to the realty, and the action was maintained; but a dissenting opinion attends, which, we regret to observe, is founded on an argument for a small docket, and a denial of a remedy for reasons of economy. The right to a remedy should not depend on the condition of a docket, and, if it does, then the gauge should be fixed and determinable. The economic ends are generally answered, by payment of costs and cost bonds. Little, 65 Minn. 48, 60 Am. St. 421 (Mostyn case stated and reviewed). *Contra,* Mexican R. R., 89 Tex. 107, 59 Am. St. 28, n. (citizen of Texas should not sue for personal injury in Mexico, because docket would be increased and costs of the administration of justice would be greatly increased, and because commercial traffic might be burdened or embarrassed if a remedy was afforded). Actions for injury to land are transitory. Eingartner, 94 Wis. 70, 59 Am. St. 859-885, ext. n. (is a right, privilege and immunity; Bartemeyer).

Jurisdiction of land in another state is a subject-matter over which a court can have no jurisdiction. Davenport, 123 N. C. 362, 68 Am. St. 827, n. (See Penn.) Conant, 23 Utah, 627, 66 Pac. 188, 90 Am. St. 721.

Closely allied with Mostyn are the doctrines of the *lex fori* and *lex loci contractus.* Van Voorhis (contract, if valid where made, is valid everywhere).

Contract; place of. McGarry, 110 Ala. 559, 55 Am. St. 40-55, n.; Wilson, 150 N. Y. 314, 55 Am. St. 680, n.; Gist, 45 S. C. 344, 55 Am. St. 763-778, ext. n.; Ford, 6 Bush (Ky.), 133, 99 Am. Dec. 663-675, ext. n. (void where made, void everywhere). A foreign corporation may be sued at home for a personal tort done abroad. Barrow Steamship Co., 170 U. S. 100: cases. Statutory rights and actions. Attrill, 70 Md. 191, 14 Am. St. 344-355, ext. n., 2 L. R. A. 779; Adams, 67 Vt. 76, 48 Am. St. 800, n.; Alabama, R. R., 97 Ala. 126, 38 Am. St. 163, 9 L. R. A. 288 (allowed where statutes are the same): Northern Pac. R. R., 154 U. S. 190, Ash, 72 Md. 144, 20 Am. St. 461, n., 2 R. R. & Corp. Rep. Cas. 345-352, n. See Rorer, Interstate Law.

Equity; jurisdiction of non-residents. Penn. Injunction lies to prevent suit in a foreign state. Miller, 85 Md. 601, 60 Am. St. 352, n., *sub,* McKyring, 70 Vt. 543, 67 Am. St. 680, n., 686: cases, 3 Lead. Eq. Cas. 201-272, 3d ed., 3 Pom. Eq. 1318, 2 Sto. Eq. 899, 1 High, Injunc. 106. *Boni judicis,* etc.

Leading Cases.—274. Mostyn.

Crimes: jurisdiction of. L. C. 171, 172; Suth. Stat. § 12.

A case involving the principle of Mostyn arose in Colorado as follows: Two residents of Colorado were mining partners, and as such, incorporated in Iowa. While both were in the latter state, one sued the other there and had him served with process for an accounting about the corporate concerns. While this suit was pending each returned to Colorado, where the defendant then sued the plaintiff and enjoined him from prosecuting his suit in Iowa, already commenced there. The defendant disregarded this injunction, which was founded on no equity whatever, except that each party was a resident of Colorado. The Colorado court not having jurisdiction of the subject-matter, the plaintiff in the Iowa case disregarded the injunction, for which he was imprisoned eight months, and until the Iowa court made orders of peremptory significance to the defendant until he should cause the plaintiff in the Iowa case to be released. This case involves many principles of the comity of courts. Some of these are discussed from a local and Colorado standpoint in Doyle, 26 Colo. See Freeman: 287.

Foreign laws presumed to be same as domestic. Suth. Stat.

275. PENN v. BALTIMORE (1750), 1 Ves. 444, 27 Eng. Rep. 1132, 2 Lead. Eq. Cas. 1808-1832, ext. n.; Brown, Jurisdic.; Mews' E. C. L.; 1 Fost. Fed. Prac. 319 (decrees *in personam*); 1 Tucker, Const. 374.

Cited, § 40, Gr. & Rud.

Jurisdiction in equity. Equity acts in personam. 1 Pom. Eq. 135-170, 428-431; 3 *id.* 1317, 1318; *Boni judicis,* etc.; 69 L. R. A. 673-697, ext. n. This is a widely quoted and cited case. 50 N. J. Eq. 638, 7 Am. St. 805, 1 Chit. Conts. 47, 1 Pars. Conts., 2 Kent, 1 Beach, Inj. 75, 80; Perry, Trusts, Pom. Eq., Bish. Eq. Sto., 2 Va. 691, 3 Am. St. 127. See Scofield v. Ry. Co. (1885), 43 Ohio, 571, 54 Am. Rep. 846-866, n.; Pennoyer: 58.

276. PUSEY v. PUSEY (1684), 1 Vern. 243, 23 Eng. Rep. 465, 1 Lead. Eq. Cas. 1109, Mews' E. C. L.

Cited, § 40, Gr. & Rud.

Specific performance; articles of special value; specific delivery up of chattels. McGowin, 12 Pa. St. 56, 51 Am. Dec. 584-590, Ans. Conts. 313; Jones, 58 C. C. A. 96-111, ext. n. (equitable jurisdiction to give title, also possession to chattels). See Dowling, 2 J. & N. 55 (picture of especial value will be ordered delivered). Flint, 4 Grant Chy. U. C. 45; *Id.* 540; *Id.* 657.

277. STOCKDALE v. HANSARD (1839), 9 Adol. & El. 1-243, 36 E. C. L. R. 7 Car. & P. 731, 8 D. P. C. 474, 2 P. & D. 1. Bro. Max., 1 Kent, 236, 3 Gr. Ev., Mews' E. C. L.; Tucker, Const. 101, 205.

Parliament is omnipotent; limitations. Parliamentary privileges are bounded by reason, justice and the forms of the law.

Leading Cases.—277. Stockdale.

Thorpe, Sharpless, Loan Ass'n: cases, Cool. Const. Lim. (of the powers which the legislative department may exercise); Marbury. Are only restrained by constitution. Leep, 58 Ark. 407, 41 Am. St. 109, n., 23 L. R. A. 264. See Oakley: 223.

Division of state power in England is fixed by precedent. *Cujus est instituere.*

278. BONAPARTE v. CAMDEN & AMBOY R. R. (1830), 1 Bald. (U. S. Cir.) 205-233; 3 F. C. 821, 1 Ash. Fed. Cit. *q. v.,* stated, 2 Kent, 338-340, High, Injunc., Brown, Jurisdic.; cited, Wood, Nuis. 770, Bish. Conts. 557, Cool. Const. Lim. 29, 266, 662, 3 Pom. Eq. 1351, 2 Sto. Eq. 927, 959*b*, Dev. Deeds, 129, 2 Kent, 359, Lewis, Em. Domain, *q. v.*

Injunctions granted to restrain trespass; to prevent irreparable injury from a threatened wrong. Bonaparte; *Ubi jus*; Moak, Torts, 109; 2 Wat. Tres. 1131; R. R. v. Greer: 283; 3 Pom. Eq. 1346-1358; More v. Massini (Cal.), *sub, Assignatus utitur,* etc.; Carney, 32 Fla. 344, 37 Am. St. 101, 22 L. R. A. 233; Lewis, 16 R. I. 15, 27 Am. St. 724, n.; 2 Beach, Inj. 1125-1166; Flint v. Corbey, 4 Grant's Chy. 45; Stevenson, *id.* 540; Fuller, *id.* 657; Edwards: 282; McGregor, 14 Utah 97, 60 Am. St. 883, n.; Moore, 43 Or. 243, 99 Am. St. 724-753, ext. n. (jurisdiction of equity over trespasses).

Habeas corpus protects the person from void and illegal acts, and property should have like protection by injunction.

"That the complainant may recover damages at law, is no answer to the application against the permanent appropriation of his property for the road under a claim of right; this is deemed an irreparable injury for which the law can give no adequate relief, or none equal to that which is given in equity and is an acknowledged ground for its interference. Trespass is destruction in the eye of equity where there is no privity of estate; it prevents its repetition or continuance; protects the rights; arrests the injury and prevents the wrong; this is a more beneficial remedy than the law can give, and therefore the proper one for a court of equity to administer."

1 Bald. (U. S.) 232-233 Moak, Underh. Torts, 109, 2 Wat. Tres. 1131; Hughes (1748), 1 Ves. Sen. 188, 28 Eng. Rep. 470; Osborn; Belknap (1817), 2 Johns. Ch. 472.

Injunction will not issue for a mere technical trespass, as where a railroad has enhanced the value of the property. O'Reilly, 148 N. Y. 347, 31 L. R. A. 407.

Tax demands; injunctions to restrain. Dows.

Eminent domain; condemnor must pay for land before occupation. Bonaparte; cited, 1 High, Injunc. 485-487, § 622; Lewis, Em. Domain; 2 Kent, 338-340; *Audi.*

A leading purpose of equity is to protect property pending litigation. New York v. Pine (1902), 185 U. S. 93, 98 (stated under EQUITY), Hughes' Proc.

Laches will defeat right to. See EQUITY.

Leading Cases.—

279. DINEHART v. LAFAYETTE (1865), 19 Wis. 677; cited, High, Injunc. *q. v.*, 1 Beach, Inj. 138.

Cited, p. 39, § 93, Hughes' Proc.

Injunctions; pleadings and practice; certainty required; singularly distinctive rules. An *ex parte* (without notice) injunction will not issue upon allegations upon information and belief. Dinehart; 1 High, Injunc. 34, 35, 2 *id.* 1535, 1531, 1587, 1569. Nor can a defendant avail himself of like denials on motion to dissolve in vacation. "Mutuality is equity." *Nihil tam conveniens est naturali,* etc.; *Ubi jus,* etc.; 1 Beach, Inj. 314; Hill, Inj. 98; Adams, Eq. 196, Chap. 116. Strictness and precision are required under codes. McLaughlin: 31: cases.

Ex parte injunctions must rest upon at least *prima facie* proof and upon full and positive allegations positively verified, or else reinforced by attending affidavits of other proofs which are at least *prima facie* in character. These upon information and belief only, are insufficient. Dinehart; Norton, 5 Paige, 249; Everly v. Rice, 3 Gr. Ch. 553; 1 Beach, Inj. 145; 1 High, Injunc. 84, 85.

Motions to dissolve before answer; province of; limitations; pleadings; practice; procedure; rationale. A leading case upon the practice, one widely cited and which leads to the standard bibliography, is Poor; 37. See 2 High, Injunc. 1507-1527, 1533; 1 Beach, Inj. 105, 144, 299-315, Adams, Eq. 196, n.; Minturn; stated in *Salmon v. Claggett* (1821), 3 Bland, Ch. (Md.) 125, 162, 1 Beach, Inj. 299, 313. Limitations of the issues upon these motions is indicated *sub,* Trapnall (actions upon injunction bonds).

Every essential equity must be positively averred—must be authenticated—established at least prima facie. Of course affidavits may attend and supplement; it is sufficient that the whole record establishes the certainty required. 1 High, Inj. 34, 35, 2 *id.* 1572, 1581; 3 Danl. Chan. Pl. & Pr. 1664-1669. A more liberal rule prevails when notice is given. 1 High, Inj. 35.

Accordingly, it may be deduced that the pleadings are most liberally viewed after notice upon final hearing. That a stricter rule applies at an *ex parte* hearing, although on notice; and that the most strict rules apply in granting an *ex parte* injunction without notice. In the latter case the evidence is often pleaded.

The practice upon motions to dissolve is peculiar. 1 Beach, Inj. 299-312. If it is affected by the limited issues above indicated and is often by statutes. In many jurisdictions it is jumbled and confused, but generally these statutes are construed permissive of the equity practice. Such statutes are strictly construed, and consistently with the *rationale* involved—the limitations and the nature of the issue as it may be constituted. The motion is

Leading Cases.—279. Dinehart.

of a dilatory character—is interlocutory—*ad interim*—and therefore is naturally governed by the strictness that governs dilatory proceedings. See ABATEMENT. The rationale is, that the writ having issued without notice, the defendant can have a hearing upon the substantial grounds upon which the injunction rests. The motion is to afford this hearing. *Audi.* Filing a demurrer or an answer raises the issues to be tried; formal defects are given the go-by for this hearing. And it is difficult to see how these can afterward be raised or heard, because of the waiver involved. *R. v. Gibson:* 149. See ABATEMENT. The hearing is limited to pointing out that the injunction improvidently issues, and the equities specifically and positively denied. Concerning these, great strictness is observed. 2 High, Inj. 1575; San Juan, 6 Colo. 222, 223. *Cf.* Breeze.

New matter can rarely be heard in vacation, for it is the equities and their positive and specific denials alone that can be heard. But new matter touching and relating to such equities and such denials may be heard; otherwise it must wait until the final hearing—the hearing upon the merits. 2 High, Injunc. 1472, 1482; 1 Beach. Inj. 299-312. What is responsive and what is not. 1 Encyc. Pl. & Pr. 916, 917. Pleadings, when responsive, must not be too narrow. *Sub,* Bissell: 42. Responsive answers; what are. 1 Beach, Eq. Pr. 369-392. And each defendant must answer.

Answer, if proper, dissolves injunction, unless proofs are offered. Note, 69 Am. Dec. 190. See 29 Am. St. 258; Poor; 1 Beach, Inj. 305-307 (the modern rule is not absolute, but discretionary).

Verified statement in answer stands as proof unless denied. Hudson, 101 Va. 63, 99 Am. St. 849; Boileau: 43.

Refusal to grant injunction requires an appeal to the supreme court. 101 Va. 63, *supra.*

Answer is equal to bill, though the latter is verified by several. Manchester, 6 Paige, 295; Adams, Eq. 196, n. It is because the answer is equal to the bill that the injunction is dissolved, as above noted.

Answers in equity. *Sub,* Boileau: 43. 1 Encyc. Pl. & Pr. 865-960. Answers in injunction cases. 1 Encyc. Pl. & Pr. 957-962.

Technical defects and inaccuracies of the bill are not available on motions to dissolve. 2 High, Injunc. 1482. But otherwise as to the answer; exceptions may be made to it at the hearing. Gibson, 1 Bland, Ch. 362, 17 Am. Dec. 306, n., 1 Beach, Eq. 292.

Dissolution of ex parte injunctions in vacation. This must either be for defects in the bill (often demurrer), or answer filed.

The answer must, like the bill (for the rule is mutual and reciprocal), be full,

Leading Cases.—279. Dinehart.

positive and certain. Note, 69 Am. Dec. 190. If upon information and belief, this will not do, unless attended with other proofs or affidavits which make it certain, positive and at least *prima facie* proof. 2 High, Injunc. 1472, 1475; Humphreys; Poor: 37, 38.

An answer sufficient in form dissolved an injunction as a matter of course, formerly. Parkinson, 3 Scam. (Ill.) 367: cases. But otherwise now. Poor, *supra;* 1 Beach, Eq. 307, 308.

New matter, not touching the essential equities, will not be heard upon a motion to dissolve in vacation. 2 High, Injunc. 1472, 1481; Hardy, 10 Gill & J. (Md.) 312, 32 Am. Dec. 167. A plea of *res adjudicata* is new matter. Burnley, 13 Tex. 536, 65 Am. Dec. 79 (a plea of *res adjudicata*); Indian River Steamboat Co., 28 Fla. 337, 29 Am. St. 258, n.; 1 Beach, Eq. 308-313; Adams, Eq. 196, n.; Minturn, *supra.*

A motion to dissolve in vacation is limited to the equities, and their full, conscientious and positive denials. Beyond this the motion or other pleading itself is limited to what it specifies. *Expressio unius,* etc., applies. Each equity must be denied. 2 High, Injunc. 1475; Indian River Steamboat Co.

Laches in applying for injunction will defeat. 2 Danl. Ch. Pl. & Pr. 1639: cases. Rule 31, Moak, Torts. And unless mutual, is ground for dissolution. 2 High, Injunc. 1490; 2 Beach, Inj. 297; *Cessante ratione legis;* Hill, Inj. 110.

Facts must be more fully stated for an *ex parte* injunction than when application is made upon notice. Suppressing any fact is ground for dissolving, without regard to the merits. 2 Danl. Ch. Pl. & Pr. 1664; 1 Beach, Inj. 280.

False and sham pleadings confer no jurisdiction. Seabury: 281. See Rensberger; Breeze.

Deception and fraud in obtaining, is ground for dissolving; the utmost good faith is exacted. 2 High, Injunc. 1474, 1655. And one must stand with clean hands. Seabury; Edwards: 282. A speculator buying lands to speculate on is denied a remedy. *Id.*

Prayer must be formal and specific, or relief will be denied upon that ground. 2 High, Inj. 1432. See White: 140 (a general prayer sufficient—any prayer is sufficient). But a stricter rule is sometimes applied where an *ex parte* injunction is sought (English rule).

Injunctions are a harsh remedy, and are sparingly used, except upon notice, or after trial. 1 High, Inj. 34, 35, 2 *id.* 1581. Notice is essential to dissolve. 1 Beach, Inj. 335.

Discretion has a large field; the remedy is applied with caution. Hubble, 88 Va. 236, 13 L. R. A. 311. And a court may consider and weigh opposite interests. Newson, 27 Ch. Div. 43-65, 3 Rul. Cas. 57; Griffith, 27 Ch. Div. 474-477; 13 Rul. Cas. 112-117, n.; Walker, 135 Ill. 13, 11 L. R. A. 577, n.; Fester, 145 Ind. 171, 32 L. R. A. 578; 1 Beach, Inj. 21, 25, 280-290; Moak, Torts, 106; Adams, Eq. 196, n.; Poor. Degrees of merit will be considered. Edwards; Hill, Inj. 78; Moak, Torts, 106; 1 High, Inj. 13.

A second motion may be allowed, if leave is granted. 1 Beach, Inj. 342. These hearings are not *res adjudicata.* Chichester. See *Res Adjudicata.*

Dismissal of bill follows denial or dissolution, unless an amendment is desired or it is retained for other purposes. 1 Beach, Inj. 321, 2 *id.* 1402.

Mandatory injunctions. Murdock's Case, *sub, Ubi jus,* etc. Great strictness of proof exacted in. Rule 30, Moak, Torts, 3 Pom. Eq. 1350, 10 Am. & Eng. Encyc. Law, 791, 1 Beach, Inj. 102. *Ubi jus.*

Irreparable injury; what is. Dudley, 67 Md. 44, 1 Am. St. 368, ext. n. See IRREPARABLE.

To restrain torts. Bonaparte: 278; Moak, Torts, Rules 27-31, 2 Beach, Eq. 710-759, 2 Beach, Inj. 1042-1188, Adams, Eq. 200-219; Miller, 121 Wis. 558, 7 L. R. A. N. S. 49-86, ext. n. (removal of gates and fences).

Crimes. Hamilton: 280; Rose v. Miles; 1 Beach, Inj. 58-60, 574, 1092, 1106.

Ex parte and interlocutory injunctions. 2 Danl. Chan. Pl. & Prac. 1663-1683, 7 Am. & Eng. Encyc. Law, 786-789; Mews' E. C. L.

Injunctions, generally. High, Injunc., 2 Beach, Eq. 638-780, Beach, Inj., 7 Am. & Eng. Encyc. Law, 729-1020; Mews' E. C. L.

280. HAMILTON v. WHITRIDGE (1857), 11 Md. 128, 69 Am. Dec. 184, n.; 1 High, Injunc. 782.

Nuisance; enjoining of; enjoining of crimes and of criminal proceedings.

Hamilton; Crighton, 70 Miss. 602, 35 Am. St. 666-681, ext. n., 21 L. R. A. 84-89, n.; Paulk, 104 Ga. 24, 69 Am. St. 128, n.; 1 High. Injunc. 782; Columbian Athletic Club, 143 Ind. 98, 52 Am. St. 407, n., 2 Am. & Eng. Eq. Cas. 340-356, ext. n.; Klein, 177 Pa. 224, 55 Am. St. 717, n.; Vegelahn, 167 Mass. 92, 57 Am. St. 443, n., 35 L. R. A. 722 (for a private person a crime may be restrained); Crawford, 128 N. Y. 341, 158 U. S. 593, 2 Beach, Eq. 652, 1 High, Injunc. 782; Haggart, 137 Ind. 43, 22 L. R. A. 577, n. (saloon); Dickinson, 78 Ia. 710, 6 L. R. A. 721, n.; Neaf, 103 Ky. 496, 41 L. R. A. 219 (bawdy-house will not be enjoined); *contra:* Hamilton; Blagen, 34 Or. 394, 44 L. R. A. 522, stating Hamilton; Paulk, 105 Ga. 501, 41 L. R. A. 772.

Morals may be protected by injunction. Hamilton; 2 Am. & Eng. Eq. Cas. 356, 445; Millhiser, 96 Ia. 327, 2 Am. & Eng. Eq. Cas. 445-453, ext. n.

Crimes; injunctions against. Bawdy-house may be enjoined. 2 Am. & Eng. Eq. Cas. 356.

Town may protect its streets. Huron,

Leading Cases.—280. Hamilton.

8 So. Dak. 449, 59 Am. St. 769, n., 1 Dill. Corp. 784. And the government its highways. Debs' Case.

Equitable jurisdiction. 1 Bish. Crim. Proc. 1412-1417. Parties. Rose v. Miles; 3 Suth. Dam. 1038, Cool. Torts, 736. Merger. White: 175. *Abuses of injunction.* Cool. Torts, 22. See EQUITY.

Injunctions against commission of crime. Crighton; Vegelahn, *supra;* 1 High, Injunc. 2027 (not enjoined). *Criminal proceedings not enjoined.* 1 High, Injunc. 20, 68, 272, 1244.

281. SEABURY v. GROSVENOR (1877), 14 Blatch. U. S. 262, 14 O. G. 679, 53 How. Prac. 192, Cox, Trademark Cas. 316, No. 12,576 Fed. Cas., Hopkins' Unfair Trade, 47, 338. §§ 13, 156, 353, Hughes' Proc. §§ 52, 70, 170, 292, Gr. & Rud.

Seabury stated: Plaintiffs were patent medicine sellers. They advertised "Benson's Capcine Plasters," as made from capcine, a wonderful vegetable principle just discovered by a celebrated chemist, and that it was approved by great leading and successful physicians in hospitals; that the flattering and astonishing results which characterized its action at one stamped it as the most remarkable principle ever discovered. A registered trade-mark was falsely claimed in the word "capcine." In fact, there was no such substance, and all these claims were humbug.

Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under such representations as those above cited, if they are false. It was shown there is no such article as "capcine" known in chemistry or medicine, or otherwise. The authorities are clear that, in a case of this description, a plaintiff loses his right to claim the assistance of a court of equity. Lee v. Haley (1870), 5 Chan. App. Cas. 159, Mews' E. C. L.; High, Injunc.; Leather Co. v. Am. Co. (1865), 4 De Gex (J. & S.) 142, 11 Hou. L. Cas. 523, 11 Eng. Rep. 1435, Mews' E. C. L.; High, Injunc. Manhattan Medicine Co., 108 U. S. 218; Wilson Co., 80 Fed. 896, 901: cases, 52 Fed. 437; 66 Fed. 753.

Motive and purpose considered in granting equitable relief. Edwards: 282. One must come into court with clean hands. *In pari,* etc.; Collins; Leather Co., *supra; Fabula.* Plaintiffs guilty of deceit as to origin and quality of a thing, or as to their rights to it, will be denied injunctive relief. 2 High, Injunc. 848.

A plaintiff's right to an interlocutory injunction is not barred by laches, when he has foreborne in a reasonable hope of an accommodation, and the defendant has not incurred expense or injury through the delay. Lee v. Haley, *supra;* Mews' E. C. L.; Weaver: 67. However, laches is often considered.

A real, *bona fide* cause of action is essential for a judgment and its continuance. Beaumont: 367; White v. Bluett; Dinehart. See Rensberger v. Britton (Colo.).

Leading Cases.—281. Seabury.

282. EDWARDS v. ALLOUEZ MIN. CO (1878), 38 Mich. 46, 7 Mor. Min. Rep. 577, 31 Am. Rep. 301.

Speculators buying property to litigate over, are denied equitable relief in that litigation. Cool. Torts, 72, 2d ed. Motive sometimes affects the right to a remedy.

Intent an element in procedure. Graver; Dash: 103, 238*a*. See MALICIOUS ACTS.

One cannot cause his injury and complain of it in equity. Lancy, 80 Mich. 169, 6 Am. St. 169. *Volenti,* etc.

283. R. R. (MEMPHIS & CHARLESTON R. R.) v. GREER (1889), 87 Tenn. 698, 711, 29 Cent. L. J. 230, 4 L. R. A. 858, ext. n.; cited, 1 High, Injunc. 180, 58 C. C. A. 540, n. § 296, Gr. & Rud.

R. R. v. Greer stated: Greer was a freight conductor, and in violation of rules allowed one Powell, a kinsman, to ride on a freight train, where he was injured, and for which he was suing in Mississippi for $5,000 damages. Afterward Greer was injured and recovered judgment for $8,000, in Tennessee, against the company. The company applied for an injunction, setting up that G. was insolvent; that if permitted to collect his judgment, and the company was also compelled to pay P. in Mississippi, then in that case G. would be liable over to the company (Harriman v. Stowe), but that it would be unable to collect from him because of his insolvency. *Held,* that G.'s proceeding should be stayed upon the principle of *quia timet.* 2 Beach, Eq. 665; 1 Beach, Inj. 545-607.

Quia timet bills will lie in equity to prevent irreparable injury on account of insolvency. R. R. v. Greer; Baird v. Goodrich, 5 Heisk. (Tenn.) 20; Pom. Eq. Jur. 1417. It has been held that a surety, when his principal is insolvent, may proceed against him before paying the debt. Miller v. Speed (1872), 9 Heisk. (Tenn.) 200, 201: cases; Pusey: 276; *Ubi jus.*

Equity suffers no wrong without a remedy. Bisph. Eq. 37; Burton, 6 Houston (Del.), 522, 22 Am. St. 363, n.

Ubi jus, ibi remedium is well illustrated at common law in *Ashby:* 276. It is instructively applied in *R. R. v. Greer; Bonaparte:* 278. Assignee of a judgment stands in the shoes of the assignor. 1 High, Injunc. 180.

Equitable jurisdiction to stay judgments and to protect rights to set-off. Freyer Co., 55 C. C. A. 529-543, ext. n.

284. ROYALL, EX PARTE (1886), 117 U. S. 241. *Habeas corpus;* unconstitutional law. Circuit courts of the United States may, in their discretion, relieve one arrested under an unconstitutional law and proceedings of a state court. Brown, Jurisdic. An unconstitutional law is no law. Royall, 117 U. S. 248; Siebold, 100 U. S. 371, 376; Kelly: 285.

Habeas corpus to relieve from unconstitutional proceedings. Conflict of cases.

Leading Cases.—284. Royall.

Koeppe, 157 Ind. 172, 87 Am. St. 162-203, ext. n.; P. v. Mallory, 195 Ill. 582, 88 Am. St. 212, n. (validity of statute cannot be tested on *habeas corpus* proceedings).

285. KELLY v. BEMIS (1855), 4 Gray (Mass.), 83, 64 Am. Dec. 50-55, ext. n., 2 Bailey, Jurisdic. 905, Mech. Pub. Off. 901, Cool. Torts, 544, Van Fleet, Coll. Att. 78, 108, Shear. Neg. 159; Hutcheson, 92 Tex. 685, 71 Am. St. 884. §§ 178*a*, 179, 185, 300, Hughes' Proc.

Cited, § 258, Gr. & Rud.

An unconstitutional law and proceedings are void and may be relieved against by *habeas corpus*. Royall, Ex parte (U. S.)

Unconstitutional statute is no protection for a justice causing an arrest under. Kelly, 83 Am. St. 767. *Contra:* Brooks, 86 Mich. 576, 24 Am. St. 137 (justice may pass upon, in good faith). See Maher v. S. See ARREST.

Practical construction. See *Communis error facit jus.* Maher: 255.

Constitutional rights, waiver of. Stewart, 45 Kan. 708, 23 Am. St. 746; Baker, 6 Hill, 47, 40 Am. Dec. 387, n., 2 Beach, Eq. 1092; Osborn v. Clark, 204 U. S. 565 (is waived if not objected to). Constitutional limitations of indebtedness. Beard v. Hopkinsville.

When recovery allowed upon contract in violation of constitution. Hitchcock.

Proceedings in violation of a constitution are *coram non judice.* Virginia Coupon Cases. Brown, Jurisdic. 105, 110. See *Habeas Corpus.* Constitutions are organic and therefore paramount. Suth. Stat. 2.

On principle, any one anywhere at any time should be welcomed to suggest that a law is unconstitutional. Each member of society should be viewed and respected as his brother's keeper from usurping wrong. Each member of society has the inherent right to defend society from arbitrariness or encroachments of state power. *Salus populi suprema lex.* There are duties and rights arising from the prescriptive constitution above the consent, the waiver and the acquiescence of injured persons. See Windsor: 1; Lange: 159. But a contrary view is fast gaining a foothold in some courts. See Wright v. Braxton, *sub*, Oakley: 222. "Masses" of cases are accumulating, against ancient landmarks.

285a. VIRGINIA COUPON CASES (1884), 114 U. S. 270-340: cases.

Cited, §§ 47, 107, 262, Gr. & Rud.

Statement of the case. Poindexter owed the state a tax of $12. Greenhow, a tax collector, seized P.'s desk and was proceeding to sell it to satisfy the tax. He brought a suit of detinue against G. Before the seizure P. had made a tender of the tax with coupons to state bonds which had been issued upon the condition that they were receivable by the state for its taxes. Afterward the state sought to repudiate the bonds and thus impair the obligation of its contract.

G. undertook to defend upon an authority given by the state; he succeeded in its courts from which P. removed the cause on error to the federal supreme court wherein he succeeded. It is a very instructive case and presents phases of these questions: The mandate of the state afford no justification for the invasion of rights secured by the constitution of the U. S. otherwise that constitution would not be the supreme law of the land. Pp. 288-292. *In præsentia majoris.* Cohens v. Vir.; Martin v. Hunters.

Leading Cases.—285a. Va. Cases.

Impairing the obligation of contracts forbidden: Bronson v. Kinzie.

One relying on a law or a defence must make it appear. Burden of proof.

Defences not pleaded are waived. Cromwell v. Co. of Sac.

Governmental corporations like states cannot commit trespass; but individuals committing trespass in the name of the state may be guilty. Tyler v. Pomeroy.

Essential, necessary parties must be present before a court will proceed. Williams v. Bankhead.

Where a state cannot be a party to make it such would be vain and useless. Lex neminem cogit, etc.

Justification defences must be pleaded. J'Anson: 91; Mostyn: 274. *An authority must be pleaded.* Hopper: 4; J'Anson: 91. *Conclusions of law insufficient.* Cruikshank: 232.

Ignorantia legis neminem excusat; officers must know the law.

The study of procedure is a study of government. U. S. v. Cruikshank; Blake v. McClung; Tyler v. Pomeroy.

286. EDWARDS v. KEARSEY (1877), 96 U. S. 595, 24 L. ed. 793, Myer, Vested Rights, 377; stated, 2 Beach, Conts. 24, 2 *id.* 1671, 1 Page, 1774, 55 Kan. 475, 49 Am. St. 264, 1 Kent, 419, n.; Seibert v. Lewis (1887), 122 U. S. 284; Suth. Stat. 471, 479; 3 Pars. Conts. 504, 1 Beach, Pub. Corp. 435, 1 Beach, Conts. 24, 2 *id.* 1631, 1667, 1669, 1671. *Cited*, § 55, Hughes' Proc.

Constitutional law; exemptions; rights and remedies; impairing the obligation of contracts. Exemption laws passed after a contract is made are void. Bronson: 238. *Ubi jus:* there is no wrong without a remedy. Rights and remedies; the latter may be changed if the former are not impaired. *De minimis:* the law does not concern itself about trifles. An exemption of $1,500 after a law is passed, is excessive. Edwards v. Kearsey.

History of causes why amendment protecting contracts was adopted. Opinion quoted under Edwards. *Ubi jus.*

A wrong without a remedy can not exist. Ashby; Windsor. Substantive law depends on adjective law. Texas R. R. v. Humble.

Exemption laws; construction of. Suth. Stat. 223, 420-423. See EXEMPTIONS, *id.*

Leading Cases.—

287. FREEMAN v. HOWE (1860), 24 How. (U. S.) 450, 26 L. ed. 749; stated, 3 Wall. 341 (Buck v. C.), 154 U. S. 274, 1 Beach, Pub. Corp. 338, 1 Kent, 410, 29 Am. St. 311, Brown, Jurisdic., Bailey, Jurisdic., 1 Fost. Fed. Prac.; cited, Cobbey, Replev. 147, 157, 159-161, Wells, Jurisdic. 152, 350, Drake, Attach. 251, Wells, Replev. Wap. Attach. Ror. Interstate Law, 14-16, 439, Ror. Jud. Sales, 508, 2 Beach, Inj. 986-988.

Cited, §§ 176, 326, 333, Hughes' Proc.

Property in custody of one court cannot be disturbed by process from another court. Byers, 149 U. S. 608: cases; Porter v. Sabin; Covell, 111 U. S. 176; Rio G. R. R., 132 U. S. 481, 482; North, 138 U. S. 271 (rule stated), Brown, Jurisdic. 95; Krippendorck, 110 U. S. 276, 28 L. R. A. 145; Plume, etc. Mfg., 136 Ill. 163, 29 Am. St. 305-318, ext. n. (conflict of jurisdiction); 1 High, Injunc. 83-93; Chitwood, 165 U. S. 443; Payne v. Drewe (1804), 4 East, 523; Moran, 154 U. S. 256-288: cases.

Facts showing the conflict should be pleaded. Smith, 9 Colo. 381; cited, Freeman. The conserving principles of procedure require this. See JURISDICTION. Receivers—assignees in bankruptcy; exclusiveness of jurisdiction. Schuyler's Steam, 136 N. Y. 169, 20 L. R. A. 391-398, ext. n.

Jurisdiction; *Custodia legis;* goods *custodia legis* are not subject to seizure upon process from other courts; the comity of courts is a conserving principle, § 98, Gr. & Rud. Freeman; Buck v. Colbath, 341, stated, 132 U. S. 482 (the officer may be sued in trespass); Ableman; Noe v. Gibson, 7 Paige 513. *Qui prior est tempore,* etc.; Payne v. Drewe, *supra;* Wallace, 13 Pet. 136; Curtis, 78 Tex. 262, 10 L. R. A. 529, n. See Mostyn: cases. *Concurrent jurisdiction.* Bailey, Jurisdic. 77-107.

Courts cannot exercise powers which will bring them in collision. Carson, 149 Mass. 52, 14 Am. St. 397, 3 L. R. A. 203, n.; cited, Buck; Sharon, 36 Fed. Rep. 337, 1 L. R. A. 572; stated, Buck (court first acquiring jurisdiction will retain it. Sharon).

Property lawfully seized and in the possession of one court cannot be disturbed by process issuing from another court. Buck.

But one may replevin his chattels if seized for the debt of another. Cobbey, Replev. 309. And other exceptions exist. Cobbey, Replev. 299-332. See Lepple, 51 N. J. L. 208, 14 Am. St. 677, 4 L. R. A. 48 (exempt goods cannot be replevined). *Contra:* Welter, 7 N. Dak. 32, 66 Am. St. 632 (contempt to do so).

Replevin will not lie for property in custodia legis. Lempt v. Fullerton (1891), 83 Ia. 192, 13 L. R. A. 408, n.

A principal cannot replevin where property was taken from his agent. Larson, 62 Minn. 256, 54 Am. St. 639, n.

Leading Cases.—287. Freeman.

Money taken from one arrested is custodia legis. Holker, *sub, Salus populi,* etc.

Property in the custody of a receiver is protected under this rule. Moran, *supra;* Wap. Attach. & Garn., §§ 577, 578.

Jurisdiction vesting in one court excludes all others. Chitwood; Moran. United States courts cannot stay proceedings in state courts. R. S. U. S. 720. See CIVIL RIGHTS; 1 Beach, Eq. Pr. 27; Crosby, 98 Me. 542, 99 Am. St. 424.

Comity of courts is mentioned in relation to the conserving principles of procedure. It is involved in many discussions. Freeman; Plume Co., *sub,* McKyring: 33.

One co-ordinate court will not enjoin process from another court of same grade. Scott, 146 Ind. 12, 58 Am. St. 345, n.

Federal officers liable in state courts for trespasses committed under process issued out of federal courts. Steele, 115 Ala. 485, 67 Am. St. 62, n. Buck v. Colbath.

Mandatory record essential to show what subject-matter is before a court, for reasons discoverable in *Freeman.*

288. ROY v. HORSELEY (1877), 6 Oreg. 382, 25 Am. Rep. 537-541, n.; Brown, Jurisdic.

Terms of court; strict provisions regulating. See MAGNA CHARTA; Blair: 170; Nixon: 117; Piper: 114. § 35, Hughes' Proc.

Courts must convene, sit and adjourn as is provided for by general law. Blair: 170; Van Fleet, Coll. Att. 30-33; Freem. Judg. 121; Cool. Const. Lim. 399; Brown, Jurisdic. 3, 26; Alison, 13 Colo. 525. *Judgment rendered in vacation is void.* Ellis, 37 Tex. Crim. Rep. 539, 66 Am. St. 831; Hilson, 107 Ga. 230, 73 Am. St. 119. See TERMS OF COURT.

Assessing powers are strictly judged also. Welty, Assess. 223; 1 Cool. Tax. 481-484. See MAGNA CHARTA.

289. LOVEJOY v. MURRAY (1865), 3 Wall., 18 L. ed. 129, 2 Smith, Cas. Torts, 709: cases, Burdick, Cas. 159.

Joint trespassers. All are liable for the acts of each. Kirkwood.

Indemnitor; warrantor; notice to defend suit; effect. Lovejoy; St. Louis Beef Co.; Consolidated, etc. Co., 171 Mass. 127, 68 Am. St. 409, n.; St. Joseph, 116 Mo. 636, 38 Am. St. 626; 1 Gr. Ev. 188, 1 Suth. Dam. 83-86, 2 Suth. Dam. 763, 7 Rob. Prac. 150-152, 2 Smith, Lead. Cas. 956, 8th ed. 801; Ryerson, 66 Me. 557; Westfield, 122 Mass. 100; Beale Dam. 177-192, 2 Sedgk. Dam. 805; 2 Black, Judg. 567-573; 2 Van Fleet, For. Adj. 576-579.

Judgment is binding on one who refuses to defend when he ought. Missouri R. R., 35 Neb. 267, 37 Am. St. 437, n.; Hammond, *sub,* MALICIOUS ACTS; 2 Van Fleet, For. Adj. 576-579, 2 Black, Judg. 567-573.

Release; discharge of one joint trespasser; effect. Ellis: 389, notes, 11 Am. St. 906-909, n.

Indemnity to officers; sheriff's, when valid.

Leading Cases.—289. Lovejoy.

Ray, 126 Mich. 417, 86 Am. St. 548-558, ext. n.; Robey v. S., 94 Mich. 61, 89 Am. St. 404-419, ext. n.; Arnolds, 94 Md. 487, 89 Am. St. 444, n.

Property does not vest in a wrongdoer by judgment recovered until it is paid. Miller v. Hyde.

Morally, one is bound to pay for property before title vests in him. Miller v. Hyde.

290. WAGNER v. GIBBS (1902), 80 Miss. 53, 31 S. E. 434, 92 Am. St. 598, n.

Cited, § 94, Hughes' Proc.

Exemplary (punitive) damages — "smart money"; allowed in civil cases, for criminal acts, although the party may also be liable criminally. Merest, 2 Suth. Dam. 290-412.

This rule is sustained by *stare decisis.* It exists in England, Arkansas, California, Delaware, Florida, Illinois, Iowa, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Vermont, Virginias, Wisconsin, and in federal courts. 80 Miss. 61.

Record of plea of guilty in criminal case admissible to show that transaction was wilful, malicious and unlawful to sustain a claim of exemplary damages. 80 Miss. 62, 92 Am. St. 601. See Brittain: 50.

Death of injured party does not abate suit for injuries to the person where statute allows representative to prosecute for injuries done a decedent. Nor does it abate the measure of damages. Death of wrongdoer abates the right to exemplary damages. A plea of *nolo contendere* cannot be used in a civil case.

290a. R. R. v. STEWART (1877), 95 U. S. 279, 284, 24 L. ed. 431.

Cited, §§ 12, 251, Hughes' Proc.

Bill of exceptions; prolixity should be avoided; substance only, of proceedings should be set out in R. R. v. Stewart. For stenographic reports, questions, answers and repetitions forbidden. Harvey, 71 Ill. 117, 120; P. v. Getty, 49 Cal. 581-584; Snyder, 33 Mich. 483; McMinn, 27 Cal. 300, 320; Bassett, *Verba relata hoc maxime,* etc.; *Utile per inutile;* Vaiden; 3 Encyc. Pl. & Pr. 330-340.

Surplusage taxed to party at fault. Ball & Socket Fastener Co., 150 U. S. Ill. (rule 10, Par. 9, Sup. Ct. Rep. applied). Prolixity and surplusage condemned. R. R. v. Stewart; Grand Trunk; 3 Encyc. Pl. & Pr. 416. § 253, Hughes' Proc.

Testimony should be condensed. Where several witnesses all testify to the same point, one may be quite fully set out as a model, so to speak, and others referring to it and stating that the witness testified substantially as the other witness. *Verba relata hoc maxime,* etc.

Where many experts testify similarly, this plan should be followed; if the adverse side desires more, it should be expressly proposed by him and noted as his addition, and if not adjudged material, it should be taxed to him, and in a vexatious case at a repressive rate. Surplusage should not be encouraged, nor be incorporated, thereby making records expensive, oppressive, cumbrous and delaying; such impose onerous duties upon review courts, which must sift and gather matter from them. 144 U. S. 415.

Leading Cases.—290a. Stewart.

Facts proved may be certified instead of the detailed evidence, to avoid prolixity. Vaiden. When a fact is judicially admitted or confessed or otherwise admitted, it is violating a sound rule to incorporate it. Only evidence relevant to the errors assigned should be incorporated. Grand Trunk.

Loose and imperfect papers in record proper cannot be noticed. Pomeroy's Lessee, 1 Wall. 592, 638; Hanna, 122 U. S. 24. Papers must be incorporated in record with certainty; mere reference to, for insertion, insufficient. Jefferson City R. R., 67 Mo. 394, 7 Cent. L. J. 46 n.; 3 Encyc. Pl. & Pr. 330-340.

Skeleton bill sufficient; clerk may fill up. Crawford, 92 Mo. 498, 1 Am. St. 745; Grand Trunk R. R., 3 Encyc. Pl. & Pr. 330-340.

Bills of exceptions ought to be taken at trial, and as it progresses this was the former rule. Pow. App. Proc. 220; but may be during term, or in such time as is fixed by order. *Sub,* Owen v. Weston; Ward v. Cochran (1893), 150 U. S. 597, 37 L. ed. 1195; 2 Ell. Prac. 1071.

A bill should be filed for each term and to separate transactions. *Contra,* Stocking, 14 Colo. 317 (may be at a subsequent term).

Bill of exceptions; how constituted; functions of. Many exceptions may be in one bill. Pomeroy's Lessee, *supra.*

Form; what it must contain. Pow. App. Proc. 225-234; 3 Encyc. Pl. & Pr. 374-516.

Constituting of bill: judge should sign, if true, L. C. 154; if not true, make it so, suggest corrections and state wherein the bill is faulty; a general objection to it is no objection. Pow. App. Proc. 233-261. As elsewhere, objections should be specific. *Consensus;* and objections not made are waived. *Expressio unius,* etc. Procedure to enforce the signing and production of a bill. Pow. App. Proc. 249-261; Jelly, 50 Ind. 1. *Contents of the bill.* Generally, all waivable matters should be presented by the bill. *Consensus,* etc.

Duty of judge to sign, assist, advise and aid in making a true bill. If a bill presented is not true, the judge should either correct it or direct in writing its correction. Jelly, *supra.* If the adverse side has objections, these should be stated in writing early and promptly, and have applied to them, on objections so stated, *Expressio unius,* etc. Statutes disqualifying parties and their attorneys from swearing to the facts, and thus giving to the certificate of a judge undue importance, and above all, other official certifi-

Leading Cases.—290a. Stewart.

cates, and on the other hand, singularly discrediting parties and attorneys more than all other classes, are dangerous in design and tendency. Great arbitrariness is often observed in settling bills, and while they are the pleadings of an appellant, he is compelled to draft and compose it, as is arbitrarily dictated, without the really responsible party disclosing himself.

Remedy for refusing to settle and sign. 3 Encyc. Pl. & Pr. 488-500.

Too much discretion is allowed, and therefore too much arbitrariness is often shown in settling bills. Rules of court should prescribe the procedure. This may be needless where there are competent and fit judges; however, the safeguard should exist.

Amendment of bill of exceptions. Sub, Owen, 3 Encyc. Pl. & Pr. 501-505.

Office of. Ell. App. Proc. 214. *Consensus.* The functions of the bill are analogous to that of pleadings. It is to present a case for review to an appellate court. Ins. Co.: 157; Wiebold, 6 Colo. Ap. 451, and to this is applied strictly, *Expressio unius,* etc.; *Verba generalia,* etc.; *Consensus;* Hake; Winter, 10 Colo. Ap. 510.

A review may be had upon the record proper and the instructions without the evidence. Seevers, 94 Iowa 75, 58 Am. St. 381, n.; Windsor: 1.

A bill of exceptions is only necessary where a review of the evidence is sought. Hume. Errors in the record proper may be reviewed without a bill. *Id.;* McAllister; Windsor: 1: cases.

Generally. 2 Ell. Prac. 1048-1090; Ell. App. Proc. 797-826; Jones, Ind. Leg. Per. *q. v.;* 3 Encyc. Pl. & Pr. 374-516 (excellent *resume*); Pow. App. Proc. 209-261. § 53; CONVENIENCE, Gr. & Rud.

290b. MILLER v. DILL (1897), 149 Ind. 326, 331, 332, 49 N. E. 272, 210 Ill. 218, 102 Am. St. 158-164.

Cited, §§ 9, 11, 12, 23, Hughes' Proc.

General objections insufficient; must be specific. Objections made on the ground that the evidence is "irrelevant," "incompetent" and "immaterial" present no question for review. See § 53: CONVENIENCE. Bram v. U. S., 10 Am. Cr. Rep. 547, *sub,* EXCEPTIONS AND ERROR; Richardson, 119 Wis. 141. S. v. Hughes, 19 Ind. App. 266; Holman, 117 Ia. 268, 94 Am. St. 293, 62 L. R. A. 395. See Shutte, 291; Rushton: 5: cases.

General objections merely challenge the authority of the court to receive the evidence. In a form, a general objection is an *ore tenus* (general) demurrer. From viewpoints of motions in arrest and collateral attack and the conserving principle of procedure, immaterial evidence need not be excepted to. Such objections and exceptions may be omitted from bills of exceptions. They add nothing where the mandatory record is never waived nor banished. Shutte, 291; *Frustra probatur.*

Leading Cases.—290b. Miller.

The policy of the law is to speed the hearing of causes upon their merits and for final ascertainment thereon. Therefore, waivable and dilatory matter is strictly judged. Kraner v. Halsey: 299; pp. 8-17, Hughes' Proc. § 53, Gr. & Rud. See ABATEMENT.

290c. GRAND TRUNK R. R. v. IVES (1892), 144 U. S. 408, 12 Sup. Ct. Rep. 679, 35 L. ed. 485, 6 Am. R. R. & Corp. Rep. 130-159, n., 210 Ill. 218, 102 Am. St. 158-164.

Exceptions must be apt, specific, certain (McDermott; Harvey: 123) *and not afterward waived, to give the requisite notice of review.* Grand Trunk. Such is necessary to give jurisdiction. Grand Trunk. § 5, Hughes' Proc. See ABATEMENT; *Consensus;* Montgomery: 292; Hickory: 194.

Bill of exceptions should omit irrelevant testimony. Only evidence bearing on the errors assigned should be included in a bill. Grand Trunk; Pennock, 2 Pet. 1, 15; Johnston, 1 Black. 209, 219; Keller, 4 How. 189, 297; R. R. v. Stewart: 290.

When but one conclusion can flow from the evidence, such is a question of law for the court. Grand Trunk; *Ad quæstionem facti,* etc.

Objections and exceptions must be specific, not general. § 144 U. S. 414-416; Van Stone, 142 U. S. 128, 12 Harvey; Montgomery: 123, 292.

Sufficient evidence to sustain a verdict. 149 U. S. 413-414. *Cf.* Citizens R. R.: 186.

Lack of sufficient evidence is waivable and therefore must be objected and excepted to. 144 U. S. 114. This rule may well be questioned where all the evidence is set forth, and *"the charge is not proved as laid."*

291. SHUTTE v. THOMPSON (1873), 15 Wall. 151, 21 L. ed. 123, Fost. Fed. Prac. 287.

Cited, p. 22; §§ 2, 5*a*, 9, 12, 14, 22, 31, 39, 51, 104, 143, 166, 168, 173, 177, 303, 334, 341, Hughes' Proc.; cited, §§ 118, 167*a*, 239, 271, 272, 278, Gr. & Rud.

Incompetent evidence need not be excepted to. See cases, *sub,* Rushton, 5; Crater; Tozer, 105 N. Y. 659, 876; cited, 156 U. S. 58, 2 Am. Crim. Rep. 174: cases. *Frustra probatur quod probatum non relevat;* Garland: 60; 1 Ell. Ev. 143.

An incompetent witness must be aptly objected to; but incompetent evidence may be objected to at any time. Windsor: 1; Campbell: 2; Winters, 102 Iowa, 53, 63 Am. St. 428, n.: cases. Void and incompetent things cannot be waived; they need not be excepted to. Shutte; Garland; *Salus populi,* etc.; §§ 17, 18, Hughes' Conts. It is held hearsay evidence is competent unless excepted to. Schlemmer, 205 U. S. 1.

A void mandatory record cannot be waived. Rushton; R. v. Wheatley, 19; Garland; Campbell. See THEORY, and cases *sub* Rushton; Hume. MANDATORY RECORD.

No *allegata,* no *probata,* is the rule.

Leading Cases.—291. Shutte.

Cooch; Adams v. Gill; Paul, 7 Tex. 345; Deitsch; Thomas v. Mackey: 15. Proofs ample, but no *aliegata;* S. P., Borkenhagen: 81; Langd. Pl. 32; Rushton: 5: cases; Bradbury: 35. See Harvey: 123; *Debile fundamentum.*

Immaterial evidence need not be excepted to. Miller: 290*b*. *Allegations are essential for competent evidence.* Bristow: 135; Langd. Pl. 32 (civil law rule); Rushton; Munday: 79; Mims, 1 Tex. 443; Paul, 7 Tex. 338, 345; Smith, 13 Tex. 532, 542; Rivers, 11 Tex. 662, 670 (must give a defendant notice—*Expressio unius,* etc.).

Variance may be waived. Dorn; See VARIANCE (this view antagonizes Shutte).

Verdicts and findings cannot supply an omitted allegation. Hitchcock: 12; Adams v. Gill. See AIDER.

From *Shutte* much may be deduced, *e. g.,* that without *allegata* there can be no *relevant probata.* Bristow; Saunderson (citing Iverslie): 46. That there can be no variance or departures, therefore pleading must be certain. See CERTAINTY. The conserving principles of procedure depend upon the above rules. A disregard of these rules introduces a distinctive jurisprudence from that of Rome, England, Massachusetts, New Jersey, and Wisconsin. Windsor: 1. Hughes' Proc.

292. MONTGOMERY v. EDWARDS (1873), 46 Vt. 151, 14 Am. Rep. 618, 619 (statute of frauds may be waived; too late to object after the contract is proved orally). Burrell, 194 U. S. 572. Only a party to a contract, not a stranger, can raise the defense of the statute. Jordan v. Greenboro Co. *Cited,* p. 14, §§ 7, 9, 12, 168, 173, 303, Hughes' Proc.

Objection to error must be apt. *Consensus;* Grand Trunk R. R.; Montgomery; Lough. Delay a waiver. Phelps, 15 How. 160; Roberts, 6 Wall. 578; Alexander, 138 U. S. 353: cases; Hickory: 194; 8 Encyc. Pl. & Pr. 156-302; 1 Bish. Crim. Proc. 123, 787-804, 1359; Lowe, 13 Utah, 91, 57 Am. St. 708, n.

Assent once given cannot be recalled. It is like an election once made; it is conclusive. Smith: 156; Terry; *Allegans,* etc.; S. v. Hope (1889), 100 Mo. 347, 8 L. R. A. 608, n. A demand may be waived generally. See WAIVER; Lough; 293.

The right to a review in the supreme court of the United States from a state court depends upon exception in the state court. Lamar, 26 Colo. 370, 77 Am. St. 261; Winona; Howard v. Fleming; Holman, 117 Iowa, 268, 62 L. R. A. 395 (Exceptions must be specific and on true grounds).

Exceptions must be specific. Harvey: 123; Grand Trunk R. R.: 290*c;* McDermott; Miller; Kraner: 299. See ABATEMENT.

Lack of apt, timely, proper, objection and exception is waiver. Consensus. When courts hold a matter cannot be raised on appeal, they in effect hold it cannot be raised after it is waived, *e. g.,* if a demand is required, or other like prerequisite, and this is not averred, and a party pleads over, and by his plea indicates that a demand or other prerequisite would have been unavailing, he thereby waives the right to such demand. *Lex non cogit.* See DEMAND; *Qui tacet,* etc.; Walber, 116 Wis. 246.

Leading Cases.—292. Montgomery

If one appears generally, he cannot recall and afterward limit this. See ABATEMENT; 22 Ill. 19; 49 N. Y. 303; Rensberger.

Exceptions are necessary in criminal cases as in civil. Secor v. S. (1903), 118 Wis. 621.

293. LOUGH v. OUTERBRIDGE (1894), 143 N. Y. 271, 42 Am. St. 712-724, 38 N. E. 292, 25 L. R. A. 674.

Cited, §§ 12, 65, 174. Hughes' Proc.

Waiver; consensus. Objection that a subject-matter is of equitable cognizance may be waived. Perego, 163 U. S. 160; So. P. R. R. v. U. S., 200 U. S. 341; Kissner, 189 Mo. 515, 107 Am. St. 368; Sto. Pl. 473: cases. Benton; Conemaugh, 186 Pa. 443, 65 Am. St. 865, n.; Kaufman, 169 Ill. 596; Clemmer, 157 Ill. 206; Harding, 177 Ill. 298, 301. See Montgomery, 1 Beach, Mod. Eq. Prac. 2-4; Sterrett, 122 N. Y. 659-662; Brown, Jurisdic. 197; Shutte: 291; Nichols, 123 Mo. 96, 45 Am. St. 514 (form of pleading, and an amendment changing the cause of action, is waived unless objected to). Harrigan, *sub,* MAGNA CHARTA.

The right to an appeal, for a federal question, from a state to the supreme court of the United States may be waived. Winona; Windsor: 19.

294. CONDUCTOR'S BENEFIT ASSOCIATION v. LEONARD (1897), 166 Ill. 154. *Courts during the term may extend time for filing bills of exceptions without notice.*

Appellants are charged with knowledge of the condition of the record. McArthur: 99. *Rehearings must not include a new case.* See APPELLATE PROCEDURE. Hughes' Proc.

295. HAND v. WADDELL (1897), 167 Ill. 405. *Skeleton bill of exceptions.* Hand; Garrick, 94 Ill. 588; Winters, 102 Iowa 53, 66 Am. St. 428 (*Verba relata hoc maxime,* etc.).

Supplemental abstract may be filed by a respondent, and if he fails, then there applies to him "Volenti non fit injuria." Hand. If one fails to do his duty he is estopped and will not be allowed to complain. See Vanderventer v. Goss.

296. BREWER BREWING CO. v. BODDIE (1896), 162 Ill. 346.

Cited, § 11, Hughes' Proc.

Errors not specified in motion for a new trial are waived and waived forever. See Missouri, 40 Mo. Ap. 679; 199 Mo. 159; Richardson: 230.

Assignments of error upon grounds which are not specified or claimed in the motion for a new trial will be regarded as waived. Brewer; West Chicago R. R., 168 Ill. 586; Singer, 150 Ind. 287; Zimmerman, 152 Ind. 552: cases. Exception matter

Leading Cases.—296. Brewing Co. must be saved by objection, exception, motion for new trial and assignment of errors. § 53; CONVENIENCE; S. v. Dilts, 191 Mo. 665; St. Louis, 189 Mo. 474. Kraner: 299. Must be argued. Atlantic; 35 Ind. Ap. 281, 111 Am. St. 163.

Of course fatal defects in the mandatory record are not waivable in character, and therefore may be raised at any time and in any way; courts will *sua sponte* notice these. Garland: 69; Windsor: 1; cases; Bloom.

General assignments of error unavailing. Brewer Co.; West Chicago R. R., *supra;* Brown v. P.; Winona; Harvey: 123; Citizen's: 186; 3 Cent. Dig. 855-860: cases.

A chain of errors may be waived by failure to make the proper statement in the motion for a new trial. If jurors are illegally selected, not only must objection be made to each error, but the jury as a whole must be objected to. Beyond these, one must properly assign error, and still beyond this he must argue it, else such abandonment is a waiver. *Consensus.*

297. GARLAND v. WHOLEBAU (1866), 20 Iowa, 271. See THEORY OF THE CASE; *Allegans contraria,* etc. *Cited,* § 186, Hughes' Proc.

One cannot change the theory of his case upon appeal. Wagner, *sub,* THEORY OF THE CASE; Rivard, *sub,* Marbury: 1-12; Lough: 292.

It cannot be "fish, flesh or fowl." Kewaunee: 29 (record proper controls).

Theory of the case controls *mandatory record.* Bailey v. Hornthal. See Kewaunee; McLaughlin: 31.

One cannot change his base on appeal. Garland: Mateer, 1 Cal. 221; 7 Mor. Min. Rep. 156; Callaway, 15 Ind. Ap. 366, 57 Am. St. 238; Bailey v. Hornthal; Parrish, 12 S. Dak. 278, 76 Am. St. 604, n.; Baily: 44.

Stability of procedure essential. Notes to Cutter: 308.

This case must be considered in connection with limitations of *Consensus;* and Garland, Campbell, Windsor; *Allegans contraria,* etc.

298. BARROW v. HILL (1851), 13 How. U. S. 54, 14 L. ed. 54, n.; 120 Ga. 67, 102 Am. St. 71. Clyde Mattox. *Cited,* § 256, Gr. & Rud.

Discretion as an element in procedure deserves careful consideration. What is a matter of discretion with a court is not reviewable for error, unless it is an abuse of discretion. Here is a most important rule in appellate procedure; for the rule is, "a court of appellate jurisdiction only" will not review and reverse matters of discretion. Barrow. But abuse of discretion is a ground of review. Ell. App. Proc. 603-606; 2 Encyc. Pl. & Pr. 409-420: cases, 7 Encyc. Pl. & Pr. 844. *De minimis.*

The following maxims introduce matters of the greatest concern to the practitioner: *Optima est lex quæ minimum relinquit arbitrio judicis. Optimus judex qui minimum sibi:* That system of law is best which confides as little as possible to the discretion of the judge. That judge is best who relies as little as possible on his own opinion. Bro. Max. 84. *Lex non exacte definit.* The law does not define exactly, but trusts in the judgment of a good man. 1 Bl. Com. 62, 431, 1 Kent, 448. See STATUTE; *Scire leges,* etc.; *Cujus est instituere,* etc.; *Boni judices est ampliare jurisdictionem:* It is the duty of a judge, when requisite, to amplify the limits of his jurisdiction. Bro. Max. 79-84. *Equal and uniform law should guide judicial action.* Bro. Max. 84.

Leading Cases.—298. Barrow.

Equity now pervades every subject of the law; its influence affects nearly every proceeding, as reference to the great volumes on Equity and Injunctions will attest. See EQUITY; MAXIMS. Hughes' Proc. In these fields, and in practice, the domain of discretion is largest. It is very large in granting or denying injunctive relief. *Sub,* Dinehart; 1 Beach. Inj. 121. The subject of Laches indicates the results of a liberal application of discretion. *Vigilantibus,* etc.

Refusal to continue a cause is not reviewable for error. De minimis, etc. Rebuttal testimony may include new matter, new evidence, after final argument. (Wells, Quest. Law and Fact, 792). The order of proof, recalling of witnesses, number of witnesses and like matters are matters of discretion. C. v. Kane: 183.

It is matter of discretion to allow one to reopen a case, and to receive more testimony after argument and submission. Rogers v. Miller (1895), 13 Wash. 82, 32 Am. St. 20; Powell, 101 Ga. 9, 65 Am. St. 276; Wells, Quest. Law and Fact, 792. A defective certificate to evidence may be corrected, after trial, and trial may proceed upon condition that formal defects will be cured before judgment. Hutchins, 52 N. H. 202, 13 Am. Rep. 19-32. Cumulative evidence; its admission is discretionary. S. v. Stowe (1891), 3 Wash. 206, 14 L. R. A. 609. Issues; directing special, also. Denver, etc. Co., 21 Colo. 371, 31 L. R. A. 566.

Motions in practice to correct pleadings (P. v. McCumber: 33), are addressed to the discretion of the court, and, unless a gross abuse, will not be reversed. 6 Encyc. Pl. & P. 280. This rule renders many sections of the code, many fundamental rules, merely commendatory, and this in many cases is most regrettable for reasons in *res adjudicata* rules, and as may be gathered from 1 Gr. Ev. 63, 2 *id.* 7; 3 *id.* 10; Bell v. Brown; Lea; 30; P. v. McCumber. Motions to make certain are often of great consequence. Lea; Wright: 28.

Discretion. 1 Bish. Crim. Proc. 6, 10, 12; 6 Encyc. Pl. & Pr. 810-822; Knox, 1 Wis. 70. *De minimis.*

Leading Cases.—

299. KRAMER v. HALSEY (1889), 82 Cal. 209, 22 Pac. 1137, S. P. Wilhoit (1891), 87 Cal. 453; Greenbaum, 102 Cal. 624; Donnell, 13 Ala. 490, 48 Am. Dec. 59, 66 (motions must be definite, certain); 6 Encyc. Pl. & Pr. 273, 274, And. Steph. Pl. § 107 (Tyl. Ed. 159). *Cited,* p. 14 §§ 8, 25, 122, 195, 251, 259, 320, 321, 324, Hughes' Proc. *Cited,* §§ 103, 235, 272, 278, Gr. & Rud.

Dilatory pleadings must be certain. Demurrer to a complaint specifying that it is "ambiguous, unintelligible and uncertain" will fail.

Exception matter in all relations must be presented with formality and precision. See Bill of Exceptions: 199 Mo. 386, 716. *Consensus tollit errorem.* The following quotation will illustrate:

"III. The next assignment of errors is that the court erred in not sustaining the defendant's motion for a new trial, because the verdict was manifestly against the weight and preponderance of the evidence; against instructions of the court; excessive, and manifestly the result of passion and sympathy, and was not a fair application of the law to the facts: We take occasion also to say that this is not an apt way to assign errors. Several supposed errors are here thrown together into one general assignment. To the whole paragraph, seven cases are cited; but to which supposed error each case is cited, we cannot tell without examining all of the cases. An assignment of errors is in the nature of a pleading. * * * But when errors are so assigned, in order to aid the court in its examination of them, each supposed error should be separately assigned, and cases should not be cited *en masse* to a collection of assignments of error, but the cases to which counsel ask the attention of the court in connection with each assignment, should be cited to that assignment." Honeycutt v. R. R. (1890), 40 Mo. Ap. 674; Brewer: 296.

The objection and the exception must be stated with precision and consistently and continuously relied upon. Cunningham v. Springer, 204 U. S. 647. *Expressio unius.*

Formal functions of the statutory record. Planing: 2*d.* Pennowfski (1907), — Mo. —, 103 S. W. 542 (very instructive case). *Expressio unius.*

The requirement for the certain pleading, the certain description pervades Procedure throughout. In substantial pleadings the requirement is discoverable in *Fabula non judicium.* Graver: 103. In dilatory and abatement pleadings it is discoverable in convenience (§ 53), and duty to the due administration of the laws. See *Allegans; Consensus.* A party owes a duty to the adverse side, and the course of justice to be certain, specific and thus helpful to the trial court and to the court of review. The decisions show that the reasoning for the requirement of certainty is sometimes for the adverse side, sometimes for the trial court, and often for the court of errors, § 53; CONVENIENCE, Gr. & Rud. In several of the states from

Leading Cases.—299. Kraner.

their hundreds of volumes, decisions are found requiring certainty for any one or all of those grounds, as the case may be. Sometimes the conclusions amount to this that there need be no certainty at all; sometimes it appears that any objection is a sufficient motion for a new trial, or for an assignment of errors.

The motion for a new trial is the last stage for gathering and presenting exception matter. Thus its importance is perceivable; § 53; CONVENIENCE, Gr. & Rud.; 199, Mo. 159; of course it relates to the statutory record. Whatever error is shown from the mandatory record, may be gathered and presented in the motion in arrest. Naturally it belongs to the mandatory record. However, this view is not consistently maintained; 199 Mo. 159, Hitchcock: 12.

The motion for a new trial is essential for exception matter, also the statutory record. Jennings, 105 Mo. 677. All that relate to these must affirmatively appear. Fast, 105 Mo. Ap. 694; Dovaston.

The motion, the record and the assignment of errors are jurisdictional. Without them a court has no power to act upon the statutory record matter. *De non apparentibus.* 105 Mo. Ap. 694, 696.

Error must be made to affirmatively appear. *Verba fortius.* Mercantile, 205 U. S. 298, unless the complaint is bad for each fault so enumerated. *Expressio unius;* Miller v. Dill; Cruikshank. See ABATEMENT. 199 Mo. 386, 716.

The rudiments of all pleadings are alike, and to illustrate this fact we frequently refer to the *rationale* of *Kraner,* which requires that dilatory pleadings be accurately described. It is a very instructive case, and well presents that idea. See ABATEMENT; Montgomery; Lough; *Omne majus,* etc.; SURPLUSAGE; *In conjunctivis.*

Special demurrers both express and define objections. Positive definition essential. Sto. Pl. 457, And. Steph. Pl. 107; Bissell: 42; Canfield, 31 Colo. 292. See ABATEMENT.

Courts will not look for formal faults, nor correct nor make cases for parties. Sto. Pl. 457. *Ignorantia legis neminem excusat.*

The law favors waiver of what can be waived—of what is not mandatory. Consequent waiver of dilatory matter results unless it is described. This is a conserving principle of procedure; § 103, Gr. & Rud. Every presumption is against the pleader. Dovaston: 217; 190 U. S. 544; Montgomery: 292; 40 Mo. Ap. 674.

Examples of strict construction of pleadings are found in *Dovaston,* also in 190 U. S. 546 and in *Kraner.*

Codes are construed to advance the conserving principles of procedure. Kraner is construed exactly as Lord Kenyon construed in *Roberts v. Moon.* See ABATEMENT; Myers (code): 150.

Leading Cases.—

300. WACO WATER & LIGHT CO. v. WACO (1894), 86 Tex. 661, L. R. A. 393-397, ext. n. *Cited*, § 12, Hughes' Proc.

Certification of questions for review. "The very question to be decided" does not satisfy the statute by presenting a certificate of the question whether or not a demurrer should be sustained to plaintiff's petition.

The statement of facts should be ultimate facts, and should be clear, certain, single, precise and exact. Jewell, 123 U. S. 432; §§ 650, 652, 693, R. S. U. S.

The practice originated in federal procedure, and has been adopted by many of the states. §§ 19, 40, MAGNA CHARTA. The idea is certainly an excellent one, and should be favored. But any practice act may be made odious and useless by hostile construction arising either from strictness or laxity. *Boni judicis*, etc. *Certificate of doubt.* 3 Encyc. Pl. & Pr. 914-917. Certified cases. 3 Encyc. Pl. & Pr. 914-956; § 19, MAGNA CHARTA:

"19. Judicial sittings of assizes to continue until business is completed" (justice to be administered without sale, denial or delay).

The framers of the American constitution no doubt had this section in mind; it is generally incorporated and frequently disregarded; the delay of courts is often an obstruction—indeed a denial of justice. Courts often aggravate what they are intended to cure. Nothing is a more fruitful cause of disaffection towards government than the abuse which led to the incorporation of this section in the Great Charter. Disregard of it is also one of the grounds specified in the Declaration of American Independence. Various wise enactments have been from time to time adopted that such provisions may be effectual. Cases made on appeal are statutory provisions for a speedy, direct and cheap review. 3 Encyc. Pl. & Pr. 880-909. Certificate of doubt, a speedy remedy. 3 Id. 914-917. Certified cases, likewise. Waco; 3 Id. 914-956.

"§ 40: To none will we sell, to none will we deny or delay right or justice. (See § 19, *supra*. "Justice shall be administered without sale, denial or delay." *Nulla vendemus.*

This section is permissive of a fee system. Henderson, 137 Ind. 552, 24 L. R. A. 469. Harrigan, *sub*, MAGNA CHARTA.

Courts shall be kept open, and justice shall be administered freely. S. Rogers, 107 Ala. 444, 32 L. R. A. 520, n.

The fee system is much abused in some states, and fees are exacted and collected, forming a revenue far beyond the expenses of the court, and forming a fund of prey and peculation by clerks, and these, too often, the appointees of the judges. Such a tax is unwarranted and such spoliations constitute grave shadows over statesmanship and official integrity. Keech.

Leading Cases.—300. Waco W. Co.

Jurisprudence, from the Roman maxims, has been an inestimable boon to humanity. It interceded at the crucifixion and superseded in Paul's trial. It has wrought the greatest blessings for the Western world; it has elevated and enlightened the Caucasian of Europe, and has made him the administrator of earth. To him, oppressed humanity looks and appeals. The black slave, carried to a foreign shore, made his supplication to the Great Jurist of the ages, whose judgment is well stated in the language of the poet:

"The air of England is too free for a slave to breathe."

From the buds of the Roman and of the Norman, have burst forth a new dispensation, for woman, infant, slave, the weak and the defenceless. This law was foretold by Paul and by Bacon; these great law-givers languished in prison and in oppression. Each advocated the same jurisprudence the maxims of which forbid delay. The Barons forced the King to stipulate that when his judge did not hold court and dispose of awaiting cases then the Barons present might select one of their number to act as judge *pro hoc vice* who should sit and fully serve the public demands. The wisdom of Magna Charta might well be followed by all governments.

Delays of justice in American courts have long called for Justitia's sons to rise and speak as they did in former ages. If those charged with government, in the highest places, constantly violate fundamental principles of the prescriptive constitution, re-expressed in written constitutions, sooner or later the restless enemies of law and order will point to the flagrant delictions of the high and mighty, as justification for rude and savage attacks resenting insult, mockery, injustice and of course palpable injury. The law has its lights and its shades; its triumphs and its defeats. It is greatly shadowed by procrastination. A speedy injustice is often to be preferred to a tardy justice. It is an important question before every government whether or not it can properly discharge its guarantees.

How obligations are viewed among individuals, will be indicated in these concluding pages.

THE CONTRACT CASES where they are reported, cited and discussed.

The following cases will introduce the elements of contract, namely, the assent (*Non hæc in fœdera veni:* I did not come into this compact); the consideration (*Ex nudo pacto non oritur actio:* No cause of action arises from a bare agreement); the legality (*In pari delicto potior est conditio defendentis*); certainty its elements and requirements; evidence required to prove, by the statute of frauds.

Familiarity with the cases pointed to will greatly aid in the mastery of contract, and cognate subjects.

It is sought to show that all of the excellent contract works are written from the "land-mark" cases, and that these merely illustrate the application of maxims and fundamental rules.

Leading Cases.—

301. LAMPLEIGH v. BRATHWAIT (Braithwait or Brathwaite) (1613), Hob. 105. 1 Smith, L. C. 267, 141-172, 11th ed. (reviewing English cases); Finch Cas. 342. 1 Add. 11, 33, 2 *id.* 847, 1 Beach, 659, Bish. 91, Chit. 34, 69, 70, Ans. 92-94, 99, Clark 198, 199, Hughes, 1, 21, 71, 72, 76, Hare, Harriman, Hilliard, Hollingworth, Laws. 108 Leake. 8, 37, Metcalf, Langd. Cas. 413. Keener Sel. Cas. 477, Pollock 12, 170, Smith, 96, Sto., Whart., 2 Kent, 464, Bro. Max. 746, 756, 39 Am. St. 735-746, 9 Cyc. 359, 360; note to Beaumont: 367; 6 R. R. 70; note to Wennall v. Adney, 6 R. R. 782, *sub,* Beaumont (a moral consideration will not support either an express or an implied promise. Mills: 316; Cook: 314).

Cited, pp. 26, 37, 38; §§ 4, 15, 22, 29, 30, Hughes' Proc.; §§ 223, 237, 283, 313, Gr. & Rud.

Lampleigh stated: Lampleigh was convicted capitally. Believing he would be executed unless pardoned he requested Brathwait to journey to London and to intercede the crown for a pardon. Moved by L.'s request, but without expectation or promise of pay for his services, B. went to London and obtained a pardon. After the services were so rendered L. promised to pay B. £500 for what he did. Afterwards B. sued upon this promise and recovered, upon that very important rule, that a *previous request* followed by a subsequent promise will constitute a contract and support an action. The consideration did not move as a gratuity, as charity, but at the request of B. It arose in L.'s head, not in B.'s. Had the pardon been obtained *without request,* then the promise to pay for it would not have been supported. Then it would have been a *nude pact.* This distinction is important as it will appear from the cases of *Cook* and *Mills,* which follow. These cases should be collectively considered.

The next case, Bartholomew, is presented in antithesis to Lampleigh. One is "a cause of action," but the other is not. The distinctions are important and should be understood. They are the groundwork of leading and important rules, which are inseparably interwoven with Procedure. This proposition should be understood. White: 17; *Beaumont:* 367.

Throughout contracts the rule is, that he who parts with no consideration for a promise is not a wronged party by its breach, and therefore he cannot recover upon the promise. Courts were not created and invested with jurisdiction to enforce charity—gratuities—nor to punish those who will not keep their word, unless they *wrong* a promisee. Now, to describe his wrong the wronged person must allege a consideration, because unless he parted with an adequate consideration he has *no cause of action.* This view is well expressed in that well known maxim, *Ex nudo pacto non oritur actio.* This suggests Procedure, while it is a fundamental rule in Contract law. The relationship of the consideration to the "cause of action" is intimate, and should be so presented. A right understanding of the consideration involves a comprehension of the "cause of action." The latter is always a question of procedure. Hughes' Conts. § 68-78. Keeping this fact in view simplifies great and extended discussions. See Two Centuries Growth of Am. Law (A. D. 1902), 67-69; *Ex nudo pacto non oritur actio.*

Consideration. A past consideration to support a promise must have been moved by a previous request. Lampleigh; Mech. Ag. 600; Bulkley: 322; 39 Am. St. 742.

Voluntary services, if moved by a previous request, will support a subsequent promise. Lampleigh; Bartholomew; Mills: 316; Vadakin: 11; Depeau; Hogins: 379; Cumber: 311; Rann: 312; Hitchcock v. Galveston; Lycoming v. Union; Compton v. Jones.

Otherwise the promise if made is a *nude pact.* Lampleigh.

Time of consideration, generally. 1 Chit. Conts. 69-74, 39 Am. St. 740; Atkins v. Banwell, 2 East, 505, *sub,* Beaumont (instructive case), 2 Gr. Ev., §§ 107, 114.

To illustrate it is observed that directors of a corporation can only claim compensation for their services when performed with the understanding that they should be given. Wood: 23 Or. 20, 37 Am. St. 651, n.; Boston Ice Co.: 320.

There are technical relations of contracts to other subjects that should be well understood. Some of these will next be referred to.

Important observation relating to procedure. Between Lampleigh and Bartholomew is discoverable the reason why a pleader must aver in many *assumpsit* suits that

Leading Cases.—301. Lampleigh.

the consideration moved at the promisor's "instance and request." Bro. Max. 764. *Cf.* 2 Langd. Conts. 1038, 1069. Now, if we omit those words we have Bartholomew, and under the rule in Rushton: 5 no wrong is described, and hence the jurisdiction of the court cannot attach to such a subject-matter. In the language of courts, there is an omitted allegation. Moore: 21: cases; Cruikshank: 232: cases. Sto. Pl. 10. And the same phase arises in a comparison of Chandelor and Pasley: 374, 375; Horne, *sub*, Chesterfield; Beaumont: 367.

A little reflection on the above question will indicate its effect in the statement of a wrong. From it the great field of procedure is brought into view, and why there must be pleadings (Campbell: 2; Tarble: 247), and why they ought to be true. Cutter: 308; Beaumont; White: 17.

It must be alleged that the consideration moved at the defendant's instance and request. Oliver v. Wood (1693), 2 Levinz, 366, 1 Langd. Cas. Conts. 419; Hays v. Warren (1732), 2 Strange, 933, 2 Barnard, 711, 1 Langd. Cas. Conts. 420 (every presumption is against a pleader. Dovaston: 217). *Verba fortius*, etc.

From the standpoint here presented, the rules in Rushton, R. v. Wheatley: 19, *and J'Anson:* 91, *are well introduced;* and why these are imperative in their demand that the statement present a cause of action, or the answer a ground of defense; and if they fail, why the general demurrer by some name and in some form, even by the name of "motion in arrest" (Cooke v. Oxley, 321) or "collateral attack," will search the whole foundation of the judgment and attach to the first fault. Windsor; Beaumont. *Debile fundamentum.*

The importance of distinction between the *Lampleigh* and *Bartholomew* cases may be suggested thus: If a recovery were allowed in the Bartholomew case and it was not alleged in the statement that the consideration moved "at the defendant's instance and request," and an execution had issued and been levied, a sale of land had thereunder and a sheriff's deed founded thereon, would the proceedings be subject to collateral attack? Beaumont. If they are, then no title passed. Here is a phase of great importance, and a point of easy acquisition from the standpoint afforded from those two cases. For this, let us add here, society was first formed to primarily protect property, secure its title and devolution according to the wishes of its owner. For all this, the first covenant and compact was that life, liberty and property could only be taken according to "due process of law," and this required a definite and certain theory of procedure, the rules of which were called "the laws of the land." That original compact is found in great charters, in constitutions and bills of rights. It should always be construed alike. *Con-*

Leading Cases.—301. Lampleigh.

temporanea exposito, etc. Now, if one's land is sold or his rights divested before he is shown to be a delict by sufficient allegations, then such proceedings are ever open to collateral attack; they are never cured. *Quod ab initio non valet, intractu temporis non convalescit.*

A title founded on proceedings open to collateral attack may be assailed by any one at any time. Windsor; Walker: 118; Ransom: 122; Pennoyer: 58; Deputron: 121; Iverslie: 46; *De non apparentibus et non existentibus eadem est ratio;* Rushton: 5; R. v. Wheatley: 19; Sto. Pl. 10; Bro. Max. 180, 182, 715. In the cases last cited are found illustrations of what are called *coram non judice* proceedings.

If a pleading sets forth a Bartholomew Case instead of a Lampleigh Case, and it omitted the allegation, "at the defendant's instance and request," then no deliction is shown. Jurisdictional facts are never presumed nor supplied by favor. Hannah: 128; Cruikshank: 232; Dovaston: 217; Beaumont: 367. Every presumption is against a pleader from start to finish, from the time the record is first opened, even to and inclusive of appellate proceedings, and especially upon questions of constructive notice and of *res adjudicata*. As we start, we continue at all times and forever. There are not two standards of construction nor stages of variant construction. The texts are always the same. Chitty seems to prefer this rule. 1 Chit. Pl. 239, 681; Wade on notice, 1401; See ALLEGATIONS; CAUSE OF ACTION. Where no deliction is averred in the pleadings none will be presumed, for all men are presumed innocent until the contrary is *alleged* and *proved*. Accordingly the rule is that, every presumption is against a pleader. Dovaston: 217; *Verba fortius;* Beaumont: 367; Hannah: 128: cases.

Omission of a necessary allegation is a ground for general demurrer, also a motion in arrest of judgment. The ground for the general demurrer is never waived, and codes expressly so provide. Filing an answer will not waive that. The general demurrer searches the whole record and attaches to the first substantial fault, and this rule means what it says. From the doctrines of collateral attack all may be deduced. And from it, no doubt, a *Bartholomew Case*, if honestly pleaded, would never support an execution or a deed founded thereon. In proving title upon a judgment there must be produced its entire record, pleadings, all, and the execution, levy, sale and sheriff's deed. Clem v. Meserole; Windsor: 1. Here again is shown how the original covenant of society is guarded and protected. Jurisdictional facts must properly be shown of record to authorize a court to proceed. Until they so appear, all buy charged with a notice of the defect. *Caveat emptor.*

Pleadings are to give constructive notice. *Constructive notice is one of the conserv-*

Leading Cases.—301. Lampleigh.

ing principles of procedure. All are charged with notice imparted from a record divesting an owner of his property, and they buy caveat emptor, which is the monitor of collateral attack. See CONSTRUCTIVE NOTICE; COLLATERAL ATTACK.

In the above is introduced a great universal, fundamental principle of procedure, equally applicable to all systems alike. *De non apparentibus,* etc. A right comprehension of it will greatly aid throughout procedure, and show how great rules of construction are sometimes rules of pleading. *Verba fortius accipiuntur contra proferentem;* Dovaston; Beaumont: 367 (instructive case).

And let us further observe that to aver the *Bartholomew* a *Lampleigh Case* is to charge a wrong by means of a false pleading; and this is immoral, is a contempt, and in sound law confers no jurisdiction. Wonderly: 102; Graver: 103; S. v. Baughman, 268; *Leges non verbis sed rebus sunt imposito; Ex dolo malo non oritur actio.* Such abuse of the right to sue in the courts constitutes a malicious prosecution in many states. McCardle.

The rules of procedure lie at the base of the law of contract. An instance illustrating that fact may be found in discussions that relate to each of these subjects, *i. e.,* when a *request* and when a *promise* will be implied. Smith, Conts. 197-204. Phases of these discussions contribute to the action of money had and received. The principles in *Lampleigh* and *Boston Ice Co.* are made as prominent as is possible in this work.

The heart and vitals of a contract lie around two leading ideas, namely, *Ex nudo facto non oritur actio,* and *non hæc in fœdera veni.* These elements will have all possible attention in the following cases, as well as the other elements mentioned in the definition of contracts. See CONTRACTS.

302. BARTHOLOMEW v. JACKSON (1822), 20 Johns. 28, 11 Am. Dec. 237, Huff. Conts. 14; stated, Keener, *Quasi* Conts. 354-356, Ans. 80, 92, n., Laws. 13, 14, 36, 37, 100, 108, Whart. 22, 494, 507, Clark, Hare, Harriman, Metcalf, Pollock, Story, Ham. 38, 53, 325, 1 Pars. 462, 2 *id.,* 50, 61, 104, 1 Chit. 34, 2 *id.* 797, 824; §§ 1, 71, 72, Hughes; 2 Page 776, 9 Cyc. 358; Mech. Ag. 600, Whart. 372, Huffc., Tiffany, Ag., Bro. Max. 746. And. Steph. Pl. 215, 640, And. Am. Law, 749. *Cited,* §§ 15, 22, Hughes' Proc.; §§ 63, 164, 281, Gr. & Rud.

Bartholomew stated: In Jackson's field was a stack of Bartholomew's wheat which he had promised to remove by a certain day so that Jackson might burn the stubble. Jackson waited until after the time fixed, then fired the stubble. The flames approached Bartholomew's wheat, and he failing to appear to remove it, Jackson, *without request but gratuitously and voluntarily—of his own motion*—hauled it beyond the reach of the fire. Held, that as the act was without the privity or assent of B., J. could not recover for it. Assent (mutuality) is essential for a contract. One is not liable for services rendered without his request. *Non hæc in fœdera veni.* Boston Ice Co. 320; Lampleigh: 301.

Had a note been given by Jackson for having saved the wheat it would have been without consideration and of no legal effect whatever. *Ex nudo pacto.* Dearborn, 3 Met. 155; Smith, Conts. 195; Ans. Conts. 93; Lampleigh. Jackson recovered 50 cents in the trial court, but B. appealed to the supreme court, then presided over by Chancellor Kent, where the cause was reversed (notwithstanding the small amount involved. *De minimis non curat lex* is not of universal application).

An equitable consideration will support a promise to pay, e. g., a debt barred by the statute of limitations, or by a discharge in bankruptcy. Trueman. *A promise to pay must be expressed or implied.* Bartholomew.

Benefits (gratuities) conferred never constitute a contract.. Smout; Boston Ice Co. 320; Lampleigh: 301, 1 Mech. Ag. 600; Abel: 34.

Spontaneous and unasked service will not support assumpsit. Woods, 39 Mich. 345, 33 Am. Rep. 396; note, 28 Am. St. 570; Bulkley: 315. A note given for such services is without consideration. Dearborn, *supra.* Nor money received by a town upon void bonds. Merrill, 138 U. S. 673, *q. v. Illustration.* A publisher of town ordinances without authority cannot recover therefor, although the services were beneficial and were accepted and appropriated. Thornton, 38 Mich. 639; Clark, Conts. 17; Mills: 316; Hughes' Conts. 73; Smith, 195. See *Ultra vires:* cases; Salt Lake v. Hollister: cases.

Publishers cannot create a contract by sending a newspaper to one. Sub, Cooke: 321. *Non hæc,* etc.

Consideration. Gratuitous or volunteer services not moved by a previous request are never the basis of recovery. No wrong arises from such premises.

Lampleigh; Mills; Boston Ice Co.; Cumber; Bainbridge: 332: Bulkley; Beaumont: 367: cases.

Payment by a volunteer gives him no right; he is not subrogated. People & Drovers' Bk., 63 Ohio, 374, 52 L. R. A. 872.

Contracts cannot be enforced upon persons against consent. That would be tyranny. A trespasser cannot plead the benefits of his trespass; if he could, he would establish a contract by a wrong. Bull. A trespasser building on the land of another loses his improvements. Bright. These well-known rules accord with the *rationale* in Bartholomew. It should be well comprehended.

303. WHITE v. CORLIES (1871), 46 N. Y. 467, Williston, Conts. 512, Huff. & W. Conts. 50; Wambaugh, Study Cas. 113; cited. Ans. Conts. 2, 15, Bish. 329, Laws. 8, Whart. 4, 15, 22, 719, Sto. 490

Leading Cases.—303. White.

Clark, 31, 32, Ham. 42, 52, Langd. Cas. Conts.; 9 Cyc. 280.

White stated: Consummation of contract essential; acceptance must be perfect. Corlies wrote White: "Upon agreeing to finish the fitting up of offices 57 Broadway in two weeks from date, you can commence at once." Receiving this, W. proceeded, bought material, etc., when the offer was countermanded. Then W. sued. Held, there was no acceptance.

Invitation to negotiate is no contract. All the terms must be complete, understood and fully assented to. 1 Page Conts. 26, 27. See TICKET. C. & A. R. R. v. Cherry. Both sides must understand and be bound, or neither. Cooke v. Oxley, 321. Ahearn, 38 Mich. 692 (Contracts must be definitely stated and agreed to). Moller (from conduct—estoppel); 1 Page Conts. 26-56.

Offer distinguished from invitation to treat. Moulton, 59 Wis. 316, 48 Am. Rep. 516, Huff. & W. Conts. 67.

Certainty is an important element of contract, and enters into its comprehensive definition.

Contracts; proposal and assent. Both parties must agree to the same thing in the same sense. Cooke: 321. See Gibbs: 405; Tarling: 404.

A promise made after a transaction is consummated is without a consideration, e. g., a warranty after treaty of sale. Bartholomew: 302.

Hopkins: 378. See ORAL. EVIDENCE; *Expressio unius*, etc.; Ayres, 52 Iowa, 478 (a promise to do what one is already bound to do is no consideration); Stilk: 313.

When a contract is agreed upon it is obligatory although the writing is yet to be signed and delivered and the money paid, as where insurance of a boat was agreed upon, but the policy was yet to be made and delivered and the premium was then to be paid. 2 Page 54; 215 Ill. 525; 106 Am. St. 187. There may be an oral contract for insurance. Commercial Co., *sub*, Dickson: 34; Russell, 176 N. Y. 178, 98 Am. St. 656.

Certainty. Uncertain agreement is no contract. Sherman: 309; Kelley: 304; Zaleski: 306. What a memorandum must contain under statute of frauds. Wain: 335; Ellis, 7 Colo. App. 350 (contract must be certain). Certainty essential for a bill or note. Kelley; 1 Page, 28.

1. *Offer must purport to create liabilities which are legally enforceable.* See IMPOSSIBILITY; ILLEGALITY; Weltmer: 268*a*.
2. *Must indicate a real intention to assume liability.* Tyler v. Pomeroy; Zaleski: 306.
3. *Must intend to assume legal relations on acceptance.* Zaleski. *Non hæc in fœdera veni.*
4. *All required terms must be complete. All elements must be satisfied.* Tyler v. Pomeroy; Zaleski. Wain: 335.

Leading Cases.—303. White.

5. *Offer must be definite.* See AMBIGUITY; Sherman: 305. Likewise the acceptance. Zaleski: 306. If one offers to guaranty performance of an undertaking, the acceptor must give notice if he accepts the offer. See GUARANTY.
6. *Necessity of communication of offer and of opportunity to consider the terms as where one accepts a ticket or a bill of lading.* 1 Page, Conts. 31; K. C. R. R. v. Riley: 357; Hollister: 354; Cherry v. C. & A. R. R. Ticket and bill of lading rules. 1 Page, Conts. 31.

Rewards; Communication of offer not necessary. Williams v. Carwardine: 322. *Contra* cases, Revocation of offer. Payne: 307; Cooke: 321; 1 Page, Conts. 34.

Acceptance implied from acts. 1 Page, Conts. 50; See ESTOPPEL. Right *to know* and *to choose* contracting party, Boston Ice Co.: 320.

304. KELLEY v. HEMMINGWAY (1852), 13 Ill. 604, 56 Am. Dec. 474-476, Bigl. Lead. Cas. (N. & B.) 10, Huffc. Nego. Insts. 151, 3 Kent, 76, 1 Rand. Com. Paper, 113, 1 Danl. Nego. Insts. 46, 1 Pars. N. & B. 39, 1 Pars. Conts. 265; Chicago Co., 190 Ill. 404, 83 Am. St. 138, n. Cited, §§ 3, 42*a*, 148, Hughes' Conts.

Cited, p. 40; §§ 112, 202, 219, 239, 250, Hughes' Proc.; §§ 164, 280, 286, Gr. & Rud.

Kelley stated: Certainty is an essential element in the law of commercial paper. A note payable when an infant is of age is no contract, being void for uncertainty. 3 Kent, 76. But otherwise if payable "thirty days after death." Carnwright, 127 N. Y. 92, 24 Am. St. 424, n., 12 L. R. A. 845, n.

Certainty of amount essential. 1 Rand. Com Paper, 104-108; Kendall, 103 Cal. 319, 42 Am. St. 117, n. (allowance of attorney's fee must be specified).

Time of payment. 1 Rand. Com. Paper, 109-120; Kelley; Crooker, *sub*, Sturdivant: 410.

Of person to be bound. Sturdivant, *supra*; 1 Rand. Com. Paper, 129, 131, 137, 147, Byles, Bills, 38, 1 Danl. Nego. Insts. 306; Stackpole v. Arnold (how agent must sign).

Payee must be certain. Title, 30 Miss. 122, 64 Am. Dec. 154-158, n.; Hegeler, 1 S. Dak. 138, 8 L. R. A. 393, n. (certainty of amount, time, and payee); Shaw, 150 Mass. 166, 6 L. R. A. 348, n.

Certainty essential for negotiability. Sturdivant; Miller, 56 Ia. 96, 41 Am. Rep. 82-85, n.: cases; Cota, 7 Met. 588, 41 Am. Dec. 464, 465, n.: Iron City Bank, 139 Pa. 52, 23 Am. St. 166, n., 11 L. R. A. 559 (condition that deposit book must be at bank before paid, vitiates); Kittermaster, 105 Mich. 219, 55 Am. St. 437-445, ext. n. (agreement for attorney fees, vitiates); Greenh. Pub. Pol. 193, 1 Rand. Com. Paper, 305: cases; Huff. Nego. Insts.; Clark, 61 Kan. 526, 78 Am. St. 337.

Leading Cases.—

305. SHERMAN v. KITSMILLER (1827), 17 Serg. & R. (Pa.) 45 Huff & W. Conts. 157; Clark, Conts. 64, Laws. 10, Ham. Conts. 86, 320; cited, § 3, Hughes' Conts. 9 Cyc. 249.

Cited, p. 40; § 112, Hughes' Proc.; §§ 164, 286, Gr. & Rud.

Sherman v. Kitsmiller stated: S. told Lizzie K., his niece, that if she would live with him and keep house for him until she married, he would give her 100 acres of land. Upon this understanding she fulfilled her part of the agreement until she married and he died. She sued the estate upon the promise of S., and the defense was, that the contract was void for uncertainty, and so the court held. What land was to be given should have been specified. A promise to give 100 pieces of gold must specify the kind—whether the smallest or the largest. And so it should have been stated as to the 100 acres. Such contracts would lie at the mercy of juries and courts. Courts do not make contracts for parties. Cutter: 308: *Expressio unius,* etc.

Effect on contract of leaving price indefinite. United, 164 N. Y. 406, 53 L. R. A. 288-300, ext. n. An indemnifying bond failing to fix the amount of penalty is void for uncertainty. Slater, 3 Colo. Ct. App. 127.

Validity of promise to give property at promisor's death. Svanburg, 75 Minn. 350, 43 L. R. A. 427.

Contracts; certainty essential. Certum est quod certum reddi potest. Uncertain agreement does not make contract. Kelley; Zaleski; Boston Ice Co.; Kyle; White: 303.

Ambiguity, effect of upon contracts. See AMBIGUITY, and cases there cited. Aspden's Estate: Sargent: Sanderson.

Indefinite or undesignated tract sold, is void. Kleber, Sales, 354. See Wain: 335.

Certainty is equally essential in contracts in judicial and taxation proceedings. Its technical requirements are the same. See L. C. 112-134. In the latter, lands must be described with certainty. Tilton: 133. Technicalities are the safeguards of the law.

306. ZALESKI v. CLARK (1876), 44 Conn. 218, 26 Am. Rep. 446, 2 Pars. Conts. 63, Whart. 593, Clark, 666, Beach, 131; Ham. 86, 443, Hawkins, 146 Mass. 184, 14 Am. St. 422, 1 Mech. Sales, 665, 666.

Cited, p. 41; § 186, Hughes' Proc.

Zaleski stated: Z., a sculptor, agreed to make a bust for Mrs. C. of her deceased husband, which, if not satisfactory, need not be accepted; and upon this ground she refused to accept it. This refusal was sustained; and it was held that she could arbitrarily refuse if she chose. Osborn, 38 W. Va. 312, 45 Am. St. 859; Frary, 52 Minn. 264, 18 L. R. A. 645, Church, 95 Cal. 626, 17 L. R. A. 207-213, ext. n.; Hawkins, 149 Mass. 284, 14 Am. St. 422, n.; Bush, 2 Colo. Ap. 48, 6 Colo. Ap. 294; Brown, 113 Mass. 136, 18 Am.

Leading Cases.—306. Zaleski.

Rep. 463, 2 Beach, Conts. 103; Braunstein, 1 B. & S. 783, 101 E. C. L. R.; Roy, 96 Ill. 361; Kendall, 196 Ill. 221, 89 Am. St. 317, n.; Barrett, 51 W. Va. 416, 90 Am. St. 802; cases (refusal must be *bona fide*).

Contra, Doll, 116 N. Y. 230, 15 Am. St. 398: cases; 2 Colo. Ap. 62: Mullally, 127 Mo. 138, 48 Am. St. 613, n. (cannot arbitrarily refuse).

Uncertain agreement does not make a contract. 1 Chit. Conts. 2-94; 2 *id.* 833; Kelley: 304. Mistake as to person contracted with, vitiates the claim of contract, although an article is delivered and consumed. Boston Ice Co.: 320.

Mutual mistake as to price prevents title passing. Rupley, 74 Ill. 351, 1 Mech. Sales, 278, Ans. Conts. 123. Or as to condition of things sold (as where a blooded cow was erroneously supposed barren); the contract may be rescinded and replevin brought. Sherwood, 66 Mich. 568, 11 Am. St. 531, Huff. & Wood Conts. 249, 1 Mech. Sales, 274-276, 424, Ans. Conts. 123; Wheadon: 349 (mistake).

307. PAYNE v. CAVE (1789), 3 Term Rep. (D. & E.) 148 Langd. Cas. Conts. 1 Keener, Sel. Conts. 114, 1 Page, 33, Finch, Cas. 7, 1 Benj. Sales, 42, 2 Kent, 478, 536, 1 Pars. Conts. 496, 512, Bish. 318, 1 Add. 21, Whart. 6, 25*b*, 787, Ham. 63, Hughes' Conts., 1 Mews' E. C. L. 930.

Cited, § 326.

Payne stated: P. offered a chattel for sale at auction. C. bid £40 for it, but before the hammer was down asked for a warranty which was refused, whereupon C. withdrew his offer. £30 was the next highest bid for which the hammer went down. P. then sued C. for the difference of the two bids but was defeated upon the rule that, both sides must be bound or neither.

Auction sales. A bidder is not bound by his offer until the hammer is down. Both parties must be bound or neither is the rule (Cooke: 321). Proposals can be retracted at any time before acceptance. Cooke v. Oxley; Tarling: 404; Tillman, 114 Ga. 406, 57 L. R. A. 784, n., 88 Am. St. 28.

Refusal to comply with bid; damage on resale. Notice of intention to resell and to hold bidder for the risk, should be given. Green, 92 Ga. 647, 44 Am. St. 110, n.

Auctioneer selling mortgaged chattels without notice, not liable for conversion. Frizzell, 88 Tenn. 396, 17 Am. St. 908, n.: Thomas, 3 Bush. (Ky.), 619, 96 Am. Dec. 264-272, ext. n. (duties and liabilities of); 1 Warv. Vend. 250-562.

Public contracts; rights of lowest bidder. Anderson, 122 Mo. 61, 26 L. R. A. 707-712, ext. n.

Puffers; effect of their bids. Gulick: 364.

The pleadings in Payne did not state all the facts (see SHAM PLEADINGS; Cutter). But at the trial, Payne's attorney made a full and true statement, whereupon Lord

Leading Cases.—307. Payne.

Kenyon ordered a *non* suit. Solemn judicial admissions bind a client. Oscanyan: 41; Mahan.

308. CUTTER v. POWELL (1765), 6 Term. Rep. (D. & E.) 320, 3 R. R. 185, 2 Sm. L. C. 1-53, 8th ed. (ablest *resume*), 6 Rul. Cas. 628, Keener, Quasi Conts. 244-248, Pars., 1 Chit., Beach, Bish. Clark, Sto., Whart., 2 Add. 907, Ham. 463 (divisible contracts), 17 R. I. 674, 16 L. R. A. 861, 59 Am. St. 290, 43 L. R. A. 810; Mech. Ag. 635, Huffc., Reinh. (approves Cutter), Tiff. Ag. (renunciation by agent in his own wrong), Bro. Max. 657, 662, 1 Sto. Eq. 471, 2 Gr. Ev. 103, 1 Suth. Dam. 547, 668, 686, 2 Sedgk. Dam. 659, 2 Mech. Sales, 1089, 2 Benj. 860, 2 Kent, 259, 468, 474, 3 *id.* 189, 471, Mews' E. C. L., cited, pp. 38, 39; §§ 5*a*, 15, 20, 22, 141, 146, 180, 186, 186*a*, 210, 224, 227, 297, 300, 304, Hughes' Proc.; §§ 1-4, 42, 48, 148, Hughes' Conts.

Cutter v. Powell is a truly interesting, useful, notable, and widely discussed and cited case. Since Britton v. Turner (1834), 6 N. H. 481, 26 Am. Dec. 713 (a widely cited case, Huffc. Ag. Reinh., Tiff. Ag.), 3 Page Conts. 1604; Dann v. Wood, a furious contention has raged in some courts. Therefore Cutter needs especial mention, and for this we state it carefully:

Cutter stated: A sailor hired for an entire voyage from Jamaica to Liverpool, payment to be made ten days after arrival. The ship sailed July 31, and reached Liverpool Oct. 11. Cutter died Sept. 20, having served more than two-thirds of the voyage. For this his representative sued, but failed in the suit, upon the doctrine of the entirety of contracts. *Expressio unius est exclusio alterius.* Features of this case are remindful of the defense of a surety, where the contract has been changed, and even to the benefit of the surety; who, nevertheless, may defend upon the idea in *Non hæc in fœdera veni* (I did not come into this compact). Rees: 334*b*.

Entire contracts; principles upon which they depend. Parties have the absolute right to make contracts which are neither *malum prohibitum* nor *malum in se*. Limitations of power to so contract are recognized in fixing the limitations of the police power. And accordingly, parties may contract against accidents if they choose and so provide, notwithstanding the maxim that an act of God shall affect no man injuriously; *Actus Dei neminem facit injuriam.* §§ 3, 4, 20, Hughes' Conts.; Bro. Max. 229-242.

One may stipulate against accident and impossibility. Paradine v. Jane (1670), Alleyn, 26: stated, 2 Smith, Lead. Cas. 39, 8th ed.; Vogt, 118 Wis. 306 (if one agrees to build a barn he must do it before he can claim his pay). Also in Middlesex Co., *sub*, Taylor v. Caldwell; Robinson v. Davison: 310, 309, 81 Am. St. 473-475; Superintendent, etc., 27 N. J. L. 543, 72 Am. Dec. 373; Dexter, 47 N. Y. 62, 7 Am. Rep. 415, Huff. & W. Conts. 649; Dermott, 2 Wall. Huff. & W. Conts. 641, 4 Am. Law Reg. (N. S.) 504, 2 Smith, L. C. 39-53, 8th ed., 3 Suth. Dam. 645.

Leading Cases.—308. Cutter.

It should be observed that great principles abut or lie in juxtaposition, for note the right to contract and the line that separates it from the police power (Millet v. P.: cases), and also that accident and impossibility are fundamental principles constituting defenses generally. Robinson; Taylor: 309, 310; Hallett; Wattles, 50 Neb. 251, 61 Am. St. 554-572, ext. n.; Lester, 2 Q. B. 12, 9 Rul. Cas. 478, n.

Still those principles yield to the rights of the parties to lawfully contract, else that right would be denied or impaired. The right to contract is fundamental and is a high, controlling and dominating right. Nordyke Co., 155 Mo. 643, 78 Am. St. 600, n. *In præsentia majoris,* etc.

Over the principles involved an interminable conflict is raging, as may be gathered from the latest efforts to present the law. And from this viewpoint the reader must look and judge. Huyett Co., 167, Ill. 233, 59 Am. St. 272, 295, ext. n.; Fisher, 102 Wis. 172, 43 L. R. A. 810: cases (strict rule of Cutter Case followed); Ornstein, 119 Wis. 429 (election of remedies—damages); Leopold, 89 Ill. 412, 31 Am. Rep. 93, n., Suth. Dam.; Sedgk., 1 Sto. Eq. 471; Norrington; Beach, Conts., Ham. Conts., Huffc. Ag. 81; Hoare v. Rennie (1859), 5 Hurl. & N. 19, Mews' E. C. L. 1; 2 Smith, Lead Cas. 39, 51, 8th ed. The student will find these discussions like those relating to Dovaston and Bristow, and the mandatory record; Windsor: 1.

Exceptions to the general rule. And it is well to note that an exceptional rule is claimed for: (1) Hiring of persons, as in Britton v. Turner, *supra,* and (2) Building contracts. Smith v. Brady (1853), 17 N. Y. 173, 72 Am. Dec. 442-455, n., 3 Suth. Dam. 709, 710.

Installment contracts; payments on not forfeited. Pierce v. Staub, 78 Conn. 459, 112 Am. St. 163-170, citing Britton.

A fundamental principle involved. But, after all, it is discoverable that the integrity of the doctrine of entire contracts, and of man's rights to lawfully contract, depend upon respect for Cutter. And this view must be accepted by those who insist for equal and uniform law for patrician and proletariat alike.

Cutter is profoundly a procedure case also, for it involves the right of a party to abandon the contract he has made and to ask a court to make a contract for him, and thus exclude or override the right of parties to lawfully contract. This is so important that we will observe that, agreeably to one's fundamental right to contract, he may stipulate against accident, impossibility, and that he will not wantonly, tortiously and *mala fide* break the contract he makes, and then allege his own wrong as a ground of recovery.

Leading Cases.—308. Cutter.

This calls for the profoundest principles in procedure, and of morals. The latter is to be taken into account in establishing and enforcing law. Trist: 214.

The juridical statement of a claim of a right which is founded upon the claimants' own wrong deliberately caused by such claimant should be viewed as are *In pari delicto* claims. Holman: 263; Weltmer: 268*a*; Seabury: 281. The principle is expressed in *Frustra legis auxilium invocat qui in legem committet:* He seeks the aid of the law in vain who offends against it. One must ask judicial aid with clean hands. Collins. *Qui primum peccat ille facit rixam.* He who commits the first offense is liable for the whole strife. "Squib Case."

Three late cases well illustrate the frequent recurrence of fundamental principles:

Owner of stolen property is not bound to pay the thief a reward offered. Schirm, 103 Md. 541, 7 L. R. A. N. S. 175, n.

The owner of a photograph may retain a picture painted therefrom by an artist not having permission. Klug, — Wis. —, 7 L. R. A. N. S. 362-367.

The offer of a reward for an arrest is not satisfied by giving information leading to the arrest. McCaughey, 147 Fed. 463, 7 L. R. A. N. S. 216 n. Shuey: 319. Jordan: 324.

The foregoing cases show that contracts have technicalities that must be respected in order that principles may be upheld and vindicated. Windsor: 1; Campbell: 2.

The study of the law office presents sentiment on the one hand and its fundamental law or DATUM POSTS on the other. Lange: 159. The landmarks of the law have been gradually silted over by judicial decisions not founded on principle. When the philosophy of the law is lost, the law is lost. This is well illustrated by the decisions of those states that construe from the supposition that codes and late cases can found a juridical establishment without regard to the principles expressed and handed down by antiquity.

Elsewhere we refer to the condition of decisions and writings in some states. Dovaston: 217. PREFACE.

One should never be allowed to take advantage of his own wrong. Nullus commodum capere potest de injuria sua propria. And besides, let us note that courts are created and only exist to remedy the wrongs of truly wronged persons, who appear and, according to the course of the law, *truly* describe the wrong that they have suffered. *Fabula.* It is a fundamental rule of construction to ever keep in view the intent of a constitution or of any compact. *Verba intentione debent inservire.* Now, in the light of these basic rules, how may one appear and complain to a court, created for the purposes declared in preambles and bills of rights,

Leading Cases.—308. Cutter.

and allege the contract truly, and then aver that he himself broke it without any assignable cause, and still recover?

Decisions that allow a recovery in such cases are in great confusion, *e. g.,* in Colorado there must be considered conflicting cases in each of two appellate courts, and, of course, a search for the "latest case" from each of these follows. The purpose of such courts is to establish the law and to respect *stare decisis;* but where that purpose fails, obedience to law is impossible. *Cujus est instituere.* Now, it is important to note the procedure that allows such results, for it is much opposed to fundamental requirements:

The claimant declares upon a *quantum meruit,* which is one thing, and the contract he made is quite another; for it is not an implied contract, but an express one. Therefore wherever the rule that *allegata et probata* must correspond is respected, it would be sufficient to deny the *quantum meruit,* and then stand on the variance. 1 Gr. Ev. 63; Bristow: 135; 2 Whart. Conts. 720. *Frustra probatur.* See VARIANCE; DEPARTURE.

It is a singular and erratic rule that requires a defendant to deny the thing alleged, and then set up the express contract and allege plaintiff's breach and the damages and benefits: then leave these to a court and jury to make a contract for the parties, and thus disregard and ignore the lawful contract they made. Suth. Dam. 283. *Non hæc in fœdera veni;* Abel; Rees: 334.

There are moral objections to such procedure, which are sufficient, overlooking the profounder ones; but these can not be fully set forth here. *Fabula,* etc.; *Frustra probatur,* etc. We will observe, however, that the doctrine of election of remedies ought not to apply here, for that is allowed where a defendant has committed a tort which estops him from disputing the plaintiff's allegations. Smith: 156. See ELECTION.

Pleadings ought to be true. False and sham pleadings involve a party in grave consequences; for these are a fraud in the administration of justice; they are instruments of chicane. Robinson: 45; §§ 5-5*b,* Hughes' Proc.

They are not good foundations for a judgment, when we construe from the purpose for which courts are created.

Wonderly: 102; Graver: 103; California: 270; Weeks, Attys. 81: cases. *Fabula,* etc. Bro. Max. 329, n., 342, 971; Lampleigh: 301.

Such pleadings are a poor servitor of the supreme laws of the land and of its parts, which are dominating principles in procedure. See §§ 5, 150, Hughes' Conts. Introduction, Hughes' Proc.

These views of procedure plainly suggest what the contract should be, and why *Expressio unius,* etc., is a great universal, fundamental principle, and why parts of

Leading Cases.—308. Cutter.

it, namely, *De non apparentibus,* etc., and *Actore non probante reus absolvitur* must ever be respected. See Campbell: 2; Bristow: 135.

Breach of contract; action for. See DAMAGES; BREACH OF CONTRACT ANTICIPATORY; IN LIMINE BREACH; RENUNCIATION OF CONTRACT. When one may sue. Frost; Hochster: 308*a*-308*b*; Newell, 119 Wis. 635.

Installment contracts; breach as to one is a breach of all. Norrington; Creswell Ranch Co.: 63 Fed. 84 (C. C. A.) (good faith no excuse for breach). Benj. Sales, 604, 7th ed.

Contract when severable. Weil, 33 Ind. Ap. 112, 104 Am. St. 243; St. Louis Co. v. Casualty Co.

Remedy of servant for wrongful discharge. Howay, 24 Wash., 88, 6 L. R. A. N. S. 49-122, ext. n.; Smith, —N. C.—, 5 L. R. A. N. S. 439-459 (Cutter); Von Heyne, 89 Minn. 77, 5 L. R. A. N. S. 525-536, ext. n.; Davidson, 138 Calif., —5 L. R. A. N. S. 579-588, ext. n.

308a. FROST v. KNIGHT (1872), 7 L. R. Ex. 11, 5 Ex. 322; reversing same case, 5 L. R. Ex. 227, 1 Eng. (Moak's) 218, Finch, Cas. Conts. 719, Chit. Conts. Pars., Bish., Clark, 645-647, Wharton, Ham., Sto., Add., Beach, Ans. 281, 282, 2 Gr. Ev. 261, 2 Benj. Sales, 860, Mech. Ag., Suth. Dam. 88, 107, 120, 645, 648, 652, Wood, Land. & Ten., 2 Kent, 468; 9 Cyc. 636; *Roehm v. Horst* (1900), 178 U. S. 1-22 (many cases cited); 3 Page. 1434, 1437, 1583-1584, affirming same case; 85 Fed. 565, Huffc. Ag. 79, 21 Nat'l Corp. Rep. 64, *et seq.:* cases, Mech. Sales, *q. v.,* Mews' E. C. L., Page Conts. 1434; § 67, Gr. & Rud.

Frost stated: Renunciation of contract gives immediate right to sue. Knight was affianced to Miss F. The nuptials were to be celebrated when his father died; before this event he renounced his undertaking and declared a contrary intention, whereupon F. immediately sued and recovered.

"One has an inchoate right in the performance of the contract: its unimpaired and unimpeached efficacy may be essential to his interests." Davis, 2 N. Dak. 300, 33 Am. St. 783-797, ext. n., 16 L. R. A. 625 (right of party to proceed to execute contract after his adversary declines to do so on his part); Smoot, 15 Wall. 36, 48; Ford, 6 Barn & Cress. 325 (13 E. C. L. R.); Wood, Land. & Ten. 95, 2 Gr. Ev. 136*a;* Kurtz, 76 Ind. 594, 40 Am. Rep. 275, Huff. & W. Conts. 358; Hochster; Roehm, quoting and reaffirming the *Frost* and *Hochster* cases.

Renunciation of contract before time for performance constitutes an *in limine* breach, for which one has an immediate right to sue. *Nullus commodum capere,* etc.; *Allegans contraria,* etc. He who offends the law cannot be protected by the law; Armory: 180.

Marriage contracts; Breach of. See *Id.*

Rescission; grounds for. See BREACH OF PROMISE; RESCISSION; Van Houten.

Leading Cases.—

308b. HOCHSTER v. DE LA TOUR (1853), 2 El. & Bl. 678 (75 C. L. R.), 20 Eng. Law & Equity, 157, 6 Rul. Cas. 576-615, n.; Mech. Ag. 624, Huffc. 79, Ans. Conts. 281, 282, Bish., Pars., Chit.; Beach, Add., Williston Cas. Conts. 377, Ham. 454, Whart., Sto. Conts. 1030, 1032, 3 Page, 1437; 9 Cyc. 636, Bro. Max. 284, 33 Am. St. 796, Benj. Sales, 2 Kent, 468, n., Suth. Dam., 117 U. S. 502; Roehm, *q. v.,* Mech. Sales, *q. v.,* Mews' E. C. L. *Cited,* § 313, Gr. & Rud.

Hochster stated: In limine breach of contract gives right to sue. D. hired H. as a courier, to commence work at a certain time; before this arrived D. changed his mind and declared the contract off. H. sued at once and before time for performance had arrived. *Held,* he could recover.

308c. DAME v. WOOD (1905), 73 N. H. 222, 70 L. R. A. 133. Britton v. Turner cited and discussed.

Entire contract; partial performance; loss by fire. When contractor to build must bear the loss from accident causing destruction of a building. If title to fixture passed to owner he must bear the loss. Hallett v. Wylie.

Quasi contracts discussed; rule stated. Cutter: 308.

308d. HALLETT v. WYLIE (1808), 3 Johns. (N. Y.) 44, 3 Am. Dec. 454-459, 165, Bro. Max., Chit. Conts., Bisph. Eq., Wash. Real Prop., Tayl. Land. & Ten., Wood, Land. & Ten.

Cited, §§ 4, 9, Hughes' Conts., §§ 297, 302.

Hallett stated: Accident; landlord and tenant; destruction of premises. H. rented W.'s house for four years, took possession, and was occupying it when, after nine months' occupancy, the house burned, and H. quit the premises after paying for the time he occupied it. Afterward W. sued for a year's rent or more. H. defended because of the destruction of the house. But this was not a good defense.

Wattles v. South Omaha, etc., Co. (1897), 50 Neb. 251, 61 Am. St. 554-572, ext. n.; *Belfour v. Weston* (1786), 1 T. Rep. (D. & E.) 310, 1 R. R. 210, 9 Rul. Cas. 436 (tenant must pay although the premises are destroyed); 8 Mews' E. C. L. 928 (Landlord and Tenant); 15 Rul. Cas. 483-496; 22 L. R. A. 613-617; *Actus Dei.*

Inherent defect of premises, tenant is not liable for. Lister v. Lane (1893), 2 Q. B. 212, 62 L. J. Q. B. 583, 69 L. T. 174, 41, W. R. 626, 9 Rul. Cas. 478, n.; 8 Mews' E. C. L. 1113.

Agreement to repair extent of liability. Burdett, 7 Adol. & El. 136 (34 E. C. L. R. 57), 2 N. & P. 122, W. W. & D. 444, 9 Rul. Cas. 476, 8 Mews' E. C. L. 1113; Polack; Boardman, 64 L. R. A. 648-667, ext. n.

Building contracts; owner must pay contract for destroyed tenement, although it is not completed. *Butterfield v. Byron* (1891), 153 Mass. 517, 12 L. R. A. 571, n.: cases; 26 Am. St. 664; Krause v. Board (1904), 162 Ind. —, 70 N. E. 264; 102

Leading Cases.—308d. Hallett.

Am. St. 203-217, n.; Halsey, 125 Wis. 311, 110 Am. St. 338; Dame v. Wood.

Cujus est dominium ejus est periculum: The risk lies upon the owner of the subject. Tarling v. Baxter: 404.

Repudiation and non-performance of a contract gives immediate right to sue. Frost: Lake S. R. R., 152 Ill. 59, 30 L. R. A. 33-73, ext. n. (right to rescind or abandon a contract because of other party's default); Windmuller, 107 N. Y. 674, Huff. & W. Conts. 555; Dingley, 117 U. S. 490, Huff. & W. Conts. 556, n.; Roehm (*in limine* breach of contracts; extended *resume;* review of all cases).

Declaration of intention to repudiate a contract waives right to performance of conditions precedent. Royal Ins. Co., 192 U. S. 149, 162. *Lex neminem,* etc.

What is a breach authorizing a suit. Bish. Conts. 1413-1447; Foster, 60 Vt. 392, 6 Am. St. 120 (refusal to give note for article sold).

Breach of entire contract; damages for. Bartlett, 79 Cal. 218, 12 Am. St. 139, n.; Hitchcock v. Galveston; Remy, 88 Cal. 537.

Contracts for personal services; breach of. Cutter; Robinson; Taylor; BREACH OF CONTRACT. Ans. Conts. 276-286.

Right of one party to proceed to execute contract after the declension of the other. Davis, 2 N. Dak. 300, 33 Am. St. 783-797, ext. n.

Countermand of executory contract of sale; effect; remedies. Oklahoma Co., 116 Ga. 140, 94 Am. St. 112-125, ext. n.

One making performance impossible is liable thereon at once. *Nullus commodum capere,* etc.

309. ROBINSON v. DAVISON (1871), L. R. 6 Exch. 269, Mews' E. C. L., Pars., Conts., Chit., Beach, 1 Add. 396, Laws, Whart., Clark, Ham. Conts.; cited, Hughes' Conts.

Cited, §§ 297, 302, Hughes' Proc.; § 69, Gr. & Rud.

Robinson stated: Mrs. D. was an eminent pianist. She contracted to play upon a certain notable occasion, for which great effort and expense were incurred. On account of sickness she failed and R. sued for damages. *Held,* he could not recover, as it was assumed in the contract that both parties would live and be able to perform; this was the foundation of the contract (Harper v. Ins. Co.). D. did not guarantee she would perform; exceptions were not provided against in the contract, and it was one she could not fill by deputy.

Blakely, 197 Pa. 305, 80 Am. St. 821 (contracts are construed from a subject-matter); St. Louis Co. v. Ins. Co. Contracts for personal services. 1 Beach., Conts. 227-231: cases. Matters of personal trust and confidence cannot be delegated. Campbell, Kans., 67 Pac., 866 Smith Conts. 157, n.; *Delegatus non potest delegare.*

A contract for the performance of particular personal services is not assignable without the assent of the parties. Chapin (1877), 31 O. St. 421. Publishers agreeing to publish a forthcoming work, they cannot assign their part of the contract, without the author's consent, to another firm. Hole, 12 Chan. Div. 886. See Boston Ice Co.: 320; Smith Conts. 157, n.

Leading Cases.—309. Robinson.

One may contract against accident. *Paradine v. Jane* (1670), Alleyn, 26; stated, 2 Smith Lead. Cas. 39, 8th ed., 81 Am. St. 473-475, Bro. Max. Chicago, etc., R. R., 139 U. S. 79, 4 Am. R. R. & Corp. Rep. 213; Cutter; Hallett.

As to who must bear the loss by fire of a building on premises sold by contract. Phinizy, 111 Ga. 346, 50 L. R. A. 680, n.

Death or disability of a party in contract for personal service. Spalding, 71 N. Y. 40; Cutter. See BREACH OF PROMISE. Contracts of a personal nature are terminated by the death of the contractor. 80 Am. St. 827.

Sickness is an excuse for non-performance of a contract for services. Gilbert, 21 Wis. 401; Wolfe, 20 N. Y. 197; Remy: 21 L. R. A. 645, n. Bro. Max. 234.

Recovery for services interrupted by sickness or death. Parker, 17 R. I. 674, 16 L. R. A. 858, n.; Cutter.

Right of teacher to salary during temporary interruption during term time. McKay, 21 Utah. 239, 50 L. R. A. 371, n.

Change of circumstances after offer and before final acceptance. Canning, 16 Q. B. Div. 727, 8 Mews' E. C. L. 27, 28 (Insurance: Life); Ans. Conts. 483; or impossibility, 3 Page Conts. 1381; Board: 63 O. St. 514, 52 L. R. A. 868.

310. TAYLOR v. CALDWELL (1862), 2 Best & Smith, 26 (113 E. C. L. R.), 6 Rul. Cas. 597-645, n., 14 L. R. A. 216, Chit. Conts., Ans., Laws. 425, 1 Add. 327, Beach, Sto., Clark, Ham. Conts., 4 Mews' E. C. L. 142 (impossible contracts); Mech. Sales, 2 Benj. Sales, Bro. Max., 2 Kent; Middlesex County, 64 N. J. Law, 240, 81 Am. St. 467; cited, § 4, Hughes' Conts.

Cited, § 297, Hughes' Proc.; § 69, Gr. & Rud.

Taylor stated: T. rented a music hall of C., and it was immediately burned before T.'s entry, but he had already incurred great expense for four nights of opera. For this he sued C., but he could not recover. *Actus Dei,* etc. Cutter.

Landlord and tenant; destruction of leased premises; when tenant must continue to pay. 36 Am. St. 174; McMillan, 42 Ala. 356, 94 Am. Dec. 654, 655, ext. n., 3 Kent, 468; Polack.

Impossibility arising from destruction of thing essential for performance. 2 Benj. Sales, 862, n.; Hallett; Board of Education, 63 Ohio, 514, 52 L. R. A. 868.

311. CUMBER v. WANE (1719), 1 Strange, 426, 1 Smith: 733-679, n., 11th ed. (reviewing English cases), 1 Pars. Conts. 232, 2 *id.* 732, 3 *id.* 4, Ans. 83, Laws. 194, Whart. 504. 935, 997, 1001, Beach, Clark, Conts. 189, 99 Mich. 247, 41 Am. St. 597; *Foakes v. Beer, infra;*

Leading Cases.—311. Cumber.

9 Cyc. 354; *Jaffray v. Davis* (1891), 124 N. Y. 164, Huff. & W., Conts. 187, 11 L. R. A. 710, Bish. Conts. 54, Add. Conts., 2 Gr. Ev. 28, 31, 2 Kent, 380, 1 Suth. Dam. 248, 1 Mews' E. C. L. 8, 9, 10 (Accord and Satisfaction); Dreyfus (Ark.), 69 L. R. A. 823: cases (denies Cumber, as also does Clayton); 74 Miss. 499, 60 Am. St. 521, n.; cited, §§ 1, 36, 68, 106, 119, 123, Hughes' Conts.

Cited, p. 38; § 20, Hughes' Proc.

Cited, §§ 33, 313, Gr. & Rud.

Cumber stated: W. owed C. £15, overdue and liquidated. For accord and satisfaction of this he gave Cumber his note for £5, payable at a future day. Afterwards Cumber sued Wane for the unpaid £10 and recovered upon the rule that all of an overdue liquidated debt cannot be satisfied by payment of a part. Had the note been paid it was held in *Cumber* that that would make no difference. But over that there is great contention. Foakes v. Beer; Pinnel's Case; Sibree v. Tripp; Goddard v. O'Brien; Longridge v. Dorville; 69 L. R. A. 823.

The plea of accord and satisfaction in Cumber was not good, and to this was filed a reply. Of course this was immaterial. To this reply a demurrer was filed but was properly carried back to the plea. Cf. Rensberger.

The agreement to pay at a different place or giving a negotiable instrument is extendedly noticed by way of distinction from *Cumber,* Goddard, Sibree (important cognate cases).

Generally, giving a note is no extinguishment of antecedent debt until it is paid. Tobey. It may be surrendered and the original consideration sued upon. Tobey. It is well to connectedly consider *Cumber, Sibree* and *Goddard.* See 1 Eng. Rul. Cas. 370-392, n., Williston, Cas. Conts. 355, 9 App. Cas. 605; Bidder, 37 Ch. Div. 413, 2 Gr. Ev. 31; *Jaffray v. Davis, supra* (reviewing *Cumber* and above cases); Chicora Fertilizing Co., 91 Md. 144, 50 L. R. A. 401 (cited Pinnel's Case and followed Cumber); Hodges, 19 Ind. Ap. 651: cases. Performance of existing contracts as a consideration for a new promise. Abbott, 163 Mass. 433, 34 L. R. A. 33-45.

Where one owes a liquidated, overdue debt, he cannot discharge it by paying a part of it only. A promise to forgive the remainder by the creditor is without consideration. Ex nudo pacto non oritur actio. To illustrate: If a wife agreed to give her husband a beneficial separation agreement provided he would supply her necessities for the next month, he could not enforce such agreement, for he is bound to supply the necessaries anyway. Performance as to a part will not discharge the entire obligation. If one bought a ticket of a railroad company from New York to San Francisco and afterward promised the common carrier to surrender the ticket for carriage to Chicago, the carrier could not enforce the latter contract for the reason that performance of a part will not satisfy the whole.

In the above illustrations the promise of the wife and of the passenger was no detriment to the husband or the carrier. Neither of such promisees was wronged by those promises. Unless one is wronged by a promise he cannot complain of it. Lampleigh; Cutter; 1 Suth. Dam. 248: cases; 1 Add. Conts. 363; Loach.

Payment of part of a judgment, and parol release of remainder on execution, is invalid. Weber, 134 Mass. 26, 45 Am. Rep. 274.

Accord and satisfaction. A lesser sum cannot be pleaded in satisfaction of a greater overdue and liquidated sum. Cumber, 2 Gr. Ev. 28, 1 Suth. Dam. 246-253: cases.

If consideration is necessary for a contract, then it is essential for its dissolution. *Nihil tam conveniens,* etc.; 1 Sm.: 663, 668.

Demanding and receiving a receipt in full, when part of a claim is denied, is an accord and satisfaction. Tanner, 108 Mich. 58, 31 L. R. A. 171. *Surrendering a note and giving a receipt even, will not avail.* 2 Chit. Conts. 1102; Walters, 3 Barn. & Adol. 889 (22 E. C. L. R.); stated, 2 Chit. Conts. 1102.

There are many interesting and instructive cases of the principle in Cumber which should be consulted, and for this we cite:

Goddard v. O'Brien (1882), L. R. 9 Q. B. Div. 37, Finch, Cas. 316, 2 Am. Law Reg. 637-643, ext. n., Mews. E. C. L., Goddard, denies Cumber, Ham. Conts. 332; *Clayton v. Clark* (1896), 74 Miss. 499, 60 Am. St. 521, n. (denies Cumber), 1 Add. Conts. 328; Fuller, 138 N. Y. 231, 20 L. R. A. 785-812, ext. n. (check given will operate); McKenzie, 120 N. Y. 260, 8 L. R. A. 257 (creditor may make a gift of the unpaid). *Turnbull v. Brock* (1871), 31 Ohio St. 649, Wamb. Stud. Cas. 81; cited, Bish. Conts. 50; Twitchell, 10 Cush. 47, 57 Am. Dec. 80.

Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136-143, ext. n.: stated, 1 Sm. L. C. 648 (agreement to pay at a different place sufficient); Clark, 53 Minn. 88, 39 Am. St. 577, n. (if a third person pays, the discharge is valid); Leeson, 99 Mich. 247, 41 Am. St. 597, n.; Eldred, 80 Iowa, 264, 20 Am. St. 416, n., citing exceptions to the rule.

Pinnel's Case (1602), 5 Coke Rep. 117*a,* 1 Rul. Cas. 368-370, n., 2 Danl. Nego. Insts. 1289, Finch, Cas. 315, Laws. Conts. 104, 50 L. R. A. 402.

Foakes v. Beer (1884), 54 L. J. Q. B. 130, 9 App. Cas. 605, 1 Rul. Cas. 370-393, n., Finch, Cas. 319, Ham. Conts. 332, 69 L. R. A. 824.

Sibree v. Tripp (1848), 15 Mees. & Wels. (Eng.) 23, 71 R. R. 545, 2 Gr. Ev. 28, Ham. Conts. 332 (giving a negotiable note for a part, is sufficient); Cumber; stated, discussed and qualified, also note:

Leading Cases.—311. Cumber.

Bro. Max. 890; 1 Pars. Contes. 332, 2 *id.* 733; Goddard; Tobey; Am. Lead. Cas.

Agreement for making payment at a different place is sufficient: Jones, *supra.*

Composition agreements are valid. Milliken, 1 Rawle (Pa.), 397, 399: stated, 1 Sm. L. C. 650, 2 Pars. Contes. 733, 2 Chit. Contes. 1102, Ans. Contes. 86, 87, 315; White, 107 N. Y. 518, 1 Am. St. 886; notes, 64 Am. Dec. 142, Laws. Contes. 105, 8 Cyc. 409-490.

Composition agreements must be paid as agreed upon, for upon this depends the obligation to accept part for all. Clarke, 12 Pet. 178. And without secret advantage to one. Hanover Bk., 142 N. Y. 404, 27 L. R. A. 33-41, n. Paying one creditor more than others is illegal, and it may be recovered back. Atkinson v. Denby (1861), 6 Hurl. & N. 778, 2 *id.* 934, Gr. Pub. Pol. 264, Kerr, Fraud, 377-379, 388, 1 Pom. Eq. 403.

Accord between plaintiff and a third person operates for all liable for a wrong. Jackson, 66 N. J. 319, 55 L. R. A. 77 (citing Cumber); Ellis: 389.

A consideration is essential. Rann; Abel v. Alexander; Hamer v. Sidway, 12 L. R. A. 463-476, ext. n. *Sub, Ex nudo pacto,* etc.

A consideration must be real. White, 317. Beaumont: 367.

Compromise as consideration. Stapilton v. *Id.* (1739), 1 Atk. 3, 26 Eng. Rep. 1, 2 Lead. Eq. Cas. 1675, 12 Rul. Cas. 100-138, n.; Pom., Sto., Bish., Beach (Eq.); Perry, Trusts; Chit. Pars., Ans., Bish. (Contes.); 13 L. R. A. 601, 17 R. I. 402.

Adequacy of consideration will not be inquired after where there is any. Thornborow: 333; *Bainbridge:* 334; *Haigh v. Brooks* (1839), 10 Adol. & El. 309 (37 E. C. L. R.), 3 P. & D. 452; Finch, Cas. 364, stated, 1 Pars. Contes. 450, 1 Langd. Contes. 210, 1015, Ans. Contes., 11 Mews' E. C. L., 2 Dev. Deeds 814 (surrendering possession of a worthless paper upon which is written a void contract is a sufficient consideration for a payment of £10,000); Hitchcock v. Coker (1837), 6 Adol. & El. 438 (33 E. C. L. R.), 1 N. & P. 796, 2 H. & W. 464, Mews' E. C. L.: cited, Bish. Contes. 72, Ans. 188; *id.* 70-72, 1 Pars. Contes. 449-453, 8th ed., Schnell v. Nell (1861), 17 Ind. 29, 79 Am. Dec. 453-457, n., Laws. Contes. 93 (one cent for $600); 1 Langd. Cas. Contes. 210, Huff. & W. Contes. 138; Horne: cases; 39 Am. St. 732-746 (able *resume* of cases and rules).

Voluntary services, or gratuities, given upon no antecedent contract or request, cannot be recovered for. Bartholomew: 302, *Boston Ice Co.*

Moral obligation is no consideration. Beaumont: cases; Cook; Mills: 316; Cumber; Lee, 318.

It is no consideration for one to do what in law he is already bound to do. Reynolds v. Nugent; Stilk: 313; Cumber; Upton v. Tribilcock; 34 L. R. A. 33-45.

Leading Cases.—311. Cumber.

Trust and confidence a sufficient consideration. Coggs, Bainbridge, Ans. Contes. 71.

Forbearance to sue for a definite period is a valuable consideration. Smith, Contes. 195. Hockenberry, 34 N. J. Law, 346, 2 Rand. Com. Paper, Bish. Pars. Contes.; Palfrey, 4 Allen (Mass.), 55, Pars., Bish., Add. Contes.; Staver, 6 Wash. 173, 36 Am. St. 142-149, ext. n. (agreement to forbear a plea in bar to original indebtedness).

Prevention of litigation. 1 Pars. Contes. 453-455, 1 Chit. 46, Leeson, 99 Mich. 247, 41 Am. St. 597.

A promise for a promise. 1 Pars. Contes. 464-468, 1 Chit. 50, 1 Add. 18, 33 (*e. g.,* a contract to marry).

Extension of time a good consideration. Depeau, 2 Rand. Com. Paper, 457, 1 Danl. Nego, Insts. 827, 1 Pars. N. & B. 224, 2 Whart. Ev. 1000.

Subscription and contribution. 1 Pars. Contes. 468-472, Ans. 86; Presbyterian Church, etc., 112 N. Y. 517, 8 Am. St. 767, n. In a subscription contract, joint or several. Gibbons, 51 Minn. 499, 22 L. R. A. 80, ext. n.

Consideration void in part. 1 Pars. Contes. 472, 1 Chit. 67; Mallan; *In pari delicto,* etc.

Illegality of consideration. Beaumont: cases. Ans. Contes. 171-208, 1 Chit. 27, 1 Pars. 473-476; *In pari delicto,* etc.; Holman, Mallan: 363-372.

Impossible. 1 Pars. Contes. 472, 1 Chit. 64; 1 Add. 327; *Lex neminem cogit,* etc.

Failure of consideration. 1 Pars. Contes. 479-482, 2 Chit. 920-928, 1 Add. 316, 317, 4 Encyc. Pl. & Pr. 948-951; Stewart, 5 Allen, 506, 81 Am. Dec. 747; Moses, 3 Burr. 10, 12. Cited, Chit. Contes. 898, 899.

Time of the consideration. 1 Pars. Contes. 485-490, 1 Chit. 69-74; Lampleigh. Generally; bills and notes; partial want of failure; illegal. 2 Suth. Dam. 542-554, 2 Dev. Deeds, 806-834.

Defect of consideration, shown by oral evidence. 2 Suth. Dam. 554, 1 Pars. Contes. 440-490 (8th ed.); Rann. See ORAL EVIDENCE.

Proving of consideration; when required; what sufficient. 2 Gr. Ev. 105; Rann. Pleading and proving of. 4 Encyc. Pl. & Pr. 944-953. *Deeds; consideration.* 2 Dev. Deeds, 806-834; Jackson v. Cleveland; Cooch.

Contract under seal imports a consideration. Ans. Contes. 49: cases, Bish. 103-109, 119, 120; Barrett, 65 Vt. 431, 36 Am. St. 876, n.; *Rann,* 312. *Contra,* Winter, 2 Colo. App. 259. But fraud or illegality may be shown to a sealed contract. *Collins v. Blantern.* See Hitchcock v. Coker, *supra.*

If under seal, no consideration need be proved. It is *prima facie* presumed; otherwise the consideration must be proved. U. S. v. Linn, 15 Pet. 290; Aller, 40 N. J. Law, 446, Huff. & W. Contes. 82; McMillan, 23 Minn. 257, Huff. & W. 54. *Amount may be shown orally.* Jackson v. Cleveland; Christmas.

Leading Cases.—311. Cumber.

Deed cannot be defeated for want of consideration. Jackson v. Cleveland: 2 Dev. Deeds, 834. But may be for fraud. McArthur, Phil. Law (N. C.), 317, 93 Am. Dec. 593, n.; Collins v. Blantern.

Rescission for failure. McCardle, 92 Ga. 198, 44 Am. St. 85, n.

A gratuitous promise under seal is binding. Ans. Conts. 49, n. See Gibson v. Warden; Cooke v. Oxley, 321.

Receipts; effect of, generally. 2 Chit. Conts. 1118-1122, 1 Add. 341, 2 Wh. Ev. 1064-1071, 1365, 1 Gr. Ev. 212, Tobey. Under seal. Ellis, 389; 2 Wh. Ev. 1063. Langhead: 209 Pa. 368, 103 Am. St. 1014 (receipt in full; effect).

Wane died after trial and before judgment was entered, which, however, was accordingly done upon the authority of the maxim: *Actus curiæ neminem gravabit.*

312. RANN v. HUGHES (1797), 7 Term Rep. (D. & E.) 350 (reported in note), 4 Bro. P. C. 27, 1 Lang. Cas. Conts. 187, 6 Rul. Cas. 1-43, n.; Finch, Case, 275; stated, Ans. Conts. 69, Keener, Sel. Conts. 379, Mews' E. C. L., 2 Kent, 450, 465; cited, 2 Rand. Com. Paper, 557, 1 Pars. Conts. 442, 1 Chit. 24, 64, 372, Ans. 42, 69, 1 Add. 3, Laws. 91, Whart. 514, 523, 684, Sto. 2, 10, 361, 512, 558, Clark, 69, 153, 185, Ham. 263, 282, 314, 1 Page, 270; 9 Cyc. 310; §§ 36, 37, 39, 78, 118, 119, 148, Hughes' Conts., 2 Wh. Ev. 853, 1 Best, Ev. 220, 2 *id.* 429, And. Am. Law. *Cited,* p. 23; § 13, Hughes' Proc.; §§ 283, 313, Gr. & Rud.

Rann stated: H., the executrix of J. Hughes, promised in writing "to answer damages out of her own estate," for no consideration. (See Eastwood v. Kenyon, 336; Lee v. Muggeridge, 318.) It was contended that under the Statute of Frauds no consideration was necessary, and that Pillans, 3 Burr, 166, Finch, Case, 263, Ham. Conts. 314, was authority. But these views were rejected. *Held,* a consideration was essential.

For a long time it had been held that a simple contract, if in writing, stood on the footing of a deed as to a consideration. But Rann introduced a different rule. For this it should be remembered. It is an epoch marking case.

A consideration must be alleged and proved in all parol or oral or unsealed agreements. Rann; *De non apparentibus;* Bro. Max. 753. See COMMERCIAL PAPER; 2 Best, Ev. 429, 1 *id.* 220, 2 Kent, 450, 465. Want of consideration does not vitiate a bill or note in the hands of a *bona fide* purchaser. Swift: cases.

Statute making contracts void, allows no recovery thereon by any one. Ans. Conts. 178, n.; Patton, 5 Mich. 505; Redf. & B. L. C. N. & B. 240, n.

Consideration; contracts. A consideration is necessary to support a contract. *Ex nudo pacto non oritur actio* (no cause of action arises out of a bare promise).

Lampleigh; Cumber; Stilk; Reynolds, *sub,* Stilk; Vadakin: 11; Wane; Hogins: 379; Coggs: 350; Harris, 23 Gratt. (Va.) 751; Fisher, 3 El. & Bl. 642 (77 E. C. L. R.).

It is still held that it is the lawful right of parties to estop themselves from questioning the consideration of a contract; also that statutes will yield to the contract the parties have made. Aller, 40 N. J. L. 446, Huff. & W. Conts. 82 (a deed imports a consideration); Jackson v. Cleveland.

Leading Cases.—312. Rann.

A sealed instrument is called a specialty—a formal contract. It derives its validity from the form alone and not from the fact of agreement. Ans. Conts. 25, 45, 239. A deed is established by proving its sealing and delivery. Ans. Conts. 240. From these two facts there arises and attaches *Probatis extremis præsumuntur media* and *Res ipsa loquitur.* The consideration is presumed. Jackson v. Cleveland. But exceptions to this rule are found in cases of fraud and illegality (Collins v. Blantern), or contracts in restraint of trade. Mallan: 373; Ellis: 389; Bish. Conts. 103-139. What is constructed of fraud, justice will tear down. *Ex dolo malo.*

Commercial paper may be attacked on wider grounds than can be a specialty, except when in the hands of an innocent holder. Swift. The execution of, delivery and consideration must be proved, if issue is made upon those or other requisites of such paper.

Why procedure and construction are so important in contracts may be gathered from such cases as Cutter, Rann and notes to Lampleigh.

At the base of the law of contract lie the rules of procedure. The rules of contract and of procedure act and react upon each other. Beaumont: 367. They are interactions. Preface, Hughes' Proc.

That a consideration moved at the promisor's "instance and request" is equally a great question in both contract and in procedure. Notes, Lampleigh. It is essential for a contract, also a cause of action.

The classification of contracts are: 1. Judgments; 2. Deeds; 3. Simple contracts. For the first two a consideration need not be alleged and proved; but the latter—the simple contract requires it, except in the case of commercial paper. These classifications depend upon questions of procedure—of pleading and of proof.

313. STILK v. MYRICK (1809), 2 Camp. 317, 11 R. R. 717; stated, 10 Pa. 39, 49 Am. Dec. 572, Huff. & W. Conts. 176, Finch, Cas. 314, Ans. Conts. 82, Laws. 103, Whart. 503, 1 Pars. 451, 1 Chit. 61, Sto. 703, Clark 186, Ham. Conts. 332: cited, Gr. Pub. Pol. 333, 1 Dill. Corp. 139, Mews' E. C. L.

Stilk stated: Consideration. It is no consideration for a man to promise to do what in law he is already bound to do. Stilk; Reynolds v. Nugent (1865), 25 Ind. 328; 34 L. R. A. 38; Cumber: 311; Rann: 312.

Stilk Case stated: To arouse sailors to put forth the greatest possible exertion to save a ship in a dangerous storm their

Leading Cases.—313. Stilk.

captain told them if they would save the ship that they should have extra pay; they did so but they could not recover for the reason sailors are bound by their contracts to do all within their power to save passengers, ship and cargo. The captain's promise to reward them beyond this, for extraordinary efforts, in a storm, to save the subjects of their trust, is without consideration. *Omne majus.*

The next case will further illustrate the above rule: A township contracted with a volunteer recruit to enlist for a stipulated bounty. Afterward another township offered him an increased amount. Then the first township, to which he was already obligated, offered him an increase of bounty. In the action for this additional amount, *held,* that he could not recover, upon the ground that it was no consideration to do what he was already bound to do.

Reynolds, *supra;* 34 L. R. A. 38, Laws. Conts. 103, 1 Pars. 452; 1 Page, 312; Cumber, Morgan, 3 Colo. 551, 554; Ayers, 52 Iowa 478.

One cannot charge extra for what he is already obligated to do. Collins v. Godefroy (1831), 1 Barn. & Adol. 950 (20 E. C. L. R.) (witness can contract for legal fees only); Cumber; Stroud, 139 Cal. 274, 96 Am. St. 111 (forbearance of one debt if one would pay another debt).

A thief is not entitled to a reward offered by the owner for a return of the stolen property. Schirm, 103 Md. 541, 7 L. R. A. N. S. 175, n. *Nullus commodum.*

Public officers are bound by the principle in Stilk; Gr. Pub. Pol. 326-368; *In pari delicto,* etc.; Lecatt, 3 Port. 115, 29 Am. Dec. 249 (attorneys subsequent contract). Nor can attorneys contract relating to a subject matter in litigation. Keech.

Officers cannot claim rewards for arrests, for these they are bound to make. Williams: 322; St. Louis R. R., 51 Ark. 504, 14 Am. St. 66; Lees, 120 Cal. 262, 40 L. R. A. 355; Hogan, 179 Ill. 150, 45 L. R. A. 166; Morris, 79 Tex. 141, 11 L. R. A. 398, n. (officers may recover reward); Buck, 109 Cal. 504, 30 L. R. A. 409 (attorneys). A promise by a third person to pay more to perform an existing obligation is sufficient. Abbott, 163 Mass. 433, 47 Am. St. 465. *Contra* cases: Smith: 10 Pa. 39, 49 Am. Dec. 572; Huff. & W. Conts. 176.

Promise to perform existing contract. Coyner, 10 Ind. 282, Huff. & W. Conts. 177; 34 L. R. A. 33-45: Cumber.

Continuing consideration. Beale, 3 Bing. N. C. 850 (32 E. C. L. R.); Trueman.

314. COOK v. BRADLEY (1838), 7 Conn. 57, 18 Am. Dec. 79, Huff. & W. Conts. 133; cited, Rand. Com. Paper, Ans. Conts., Pars., 1 Chit., Bish., 1 Add. 4, Smith, 202, Whart., Sto., Clark, Ham., 1 Page, Gr. Pub. Pol. 150, 2 Kent, 208, 464-464; Howe's Civil Law 201; Hughes' Conts.

Cook stated: C. Sr. was indigent; C. Jr. was rich. The latter, learning that his poor father had become indebted to B., wrote and promised B. that he felt obligated and would pay his father's debt

Leading Cases.—314. Cook.

of $60. B. sued C. Jr., but was defeated because this was merely a moral obligation. Lee: 318. Children are not legally bound to support parents. Cook; Bon Homme County, 13 S. D. 309, 50 L. R. A. 351, n. (liability to pay for indigent relatives).

Consideration. Moral obligation insufficient. Cumber; Mills; Trimble, Ky. 53 L. R. A. 353-376, ext. n. Beaumont: 367.

315. BULKLEY v. LANDON (1818), 2 Conn. 404: cited, 1 Chit. Conts. 69, Bish. 89; Laws. 107, Whart. 513, Sto. 596, Clark, Conts. 198, Ham. Conts. 324, 9 Cyc. 358, Hughes' Conts.

Consideration. Promise founded on a past consideration is not binding. Bartholomew; Beaumont. A promise to pay one for *having indorsed,* is not equal in law to a promise to pay *if one would indorse.* Bulkley; Cumber: 311; Bro. Max. 794.

A past consideration moved by a previous request will support a promise. Lampleigh.

316. MILLS v. WYMAN (1825), 3 Pick. 207, Langd. Conts. 370, Huff. & W. Conts. 201, Pattee Cas. 284. Howe's Civil Law 201; 1 Page 319; 9 Cyc. 350; Bish. 90, 1 Pars. 335, 446, 1 Chit. 53, 58, Ans. 80, Laws. 103, Smith, 195, n., Whart. 512, Clark, 180, 198, 201, 204, Sto. *q. v.* Ham. Conts. 323, Greenh. Pub. Pol. 150, 2 Kent, 208, 465; cited, § 72, Hughes' Conts.

Mills stated: W.'s adult son was abroad, sick and needy. M., without a previous request by W., supplied the son with medicine, clothes, etc. Afterward the father promised M. to pay him for these. In an action upon this promise M. was defeated, upon the ground that he voluntarily supplied the son; the defendant had not previously requested the same.

In Lampleigh: 301, the consideration *moved upon the request of the promisor.* From that he may show he stands a *wronged* party. The *wronged* party from the promise is an indispensable element for the cause of action in procedure. Lampleigh; Cumber: cases. If the consideration moved from the promisee from his own spontaneous volition, as in Bartholomew, then a subsequent promise constitutes no contract; otherwise if the promisor *requested* it, and *afterward* promised, as in Lampleigh. These distinctions must be remembered. A moral consideration is nonenforceable. Cumber: Boston v. Dodge (1818), Blackf. (Ind.) 18-21, n. (promise to pay a trespasser for improvements if he will surrender possession).

Contract; consideration. A promise to pay for goods already furnished, without a previous request, is a *nudum pactum.* Lampleigh; Bartholomew: 302; Cumber; Wambaugh, Study of Cas. 52; Beaumont: 367. *Contra:* Lee: 318.

A post election promise to pay an elector for his support is a nude pact, and is immoral also. Dearborn, 3 Met. 155, Smith, Conts. 195, n. Bartholomew: 302.

A warranty must be during the treaty of

Leading Cases.—316. Mills.

sale. Hopkins: 378. See ORAL EVIDENCE. Laws. Conts. 91.

317. WHITE v. BLUETT (1854), 23 L. J. Exch. 36 (24 E. C. L. R.), 434, 2 C. L. R. 301; Bro. Max. 750; cited, 1 Pars. Conts. 455, Ham. 317, Laws. 102, Sto. 544, 548, Bish. 44, 1 Beach, 153, Clark, Conts. 183; 1 Mews' E. C. L. See Crowther; Callisher; cited, § 122, Hughes' Conts.

White case stated: Vague and unreal consideration insufficient. W., executor of B. Sr., sued B. Jr., a son, on a note he had given his father. B. Jr. pleaded that his father agreed to discharge him from the payment of the note if he would not pester or "bore" his father about advancements made other heirs and the conceived equities of the son as to the descent and distribution of the father's estate. *Held,* not a defense, and that B. could recover. A consideration must be real. Cumber: 311. Also relate to a lawful subject matter. Beaumont: 367.

A mere nullity or absurd thing will never constitute a consideration. What is enforceable in law must be a real and substantial injury; otherwise courts are misemployed. Bro. Max. 329, n. *Fabula non judicium.* Courts were not created and ordained to preside over and consider mockeries, myths and moot cases. See JURISDICTION. Nor to sit as bandits dividing booty, nor to enforce honor among thieves and violators of law and what concerns public policy. Beaumont: 367; *In pari.* And this affords an extended view of jurisdiction and procedure, which we can here only suggest. See Lampleigh: 301; COMPROMISE; CAUSE OF ACTION; Beaumont: 367.

318. LEE v. MUGGERIDGE (1813), 5 Taunt. 36 (1 E. C. L. R.), Ewell, L. C. Inf., 1 Langd. Conts. 333, 1 Chit. Conts. 52-56, Ans. 100, 101, Bish. 44, 1 Beach, 153, 1 Pars. 145, Ham. 323, 328, Smith, 169, Whart. 512, 513, Clark, *q. v.*, Sto. Conts., *q. v.*, 1 Page 320; Mews' E. C. L., 2 Kent, 466; cited, 1 Rand. Com. Paper, 293, 2 *id.* 487, 1 Danl. Nego. Insts. 249, 1 Pars. N. & B. 79, Bro. Max. 751, 2 Greenl. Ev. 114, 39 Am. St. 735.

Moral obligation a good consideration for a promise. A moral obligation is a sufficient consideration for a promise to pay. *A feme covert* having an estate settled to her separate use, gave a bond for payment by her executors of money advanced, at her request, on security of that bond, to her son-in-law. After her husband's decease, she wrote, promising that her executors should settle the bond. *Held,* that *assumpsit* will lie against the executors on this promise of the testatrix.

See Eastwood: 336, *Cf. Mills:* 316, which is the generally accepted law. Beaumont: cases (Wennall v. Adney); *Cook:* 314, 1 Chit. Conts. 53-55; Porterfield, 47 Miss. 165, 12 Am. Rep. 329-338; *Ferguson v. Harris* (1893), 39 S. C. 323, 39 Am. St. 731-746, ext. n., citing Eastwood, Mills, Beaumont, Cook and Lee; Craig v. Van Bebber, Robinson, 78 Md. 59, 44 Am. St. 266, n. (sometimes a moral considera-

Leading Cases.—318. Lee.

tion is sufficient for a promise); Lycoming, Bailey, 167 Pa. 569, 46 Am. St. 691.

319. HENDRICK v. LINDSAY (1876), 93 U. S. 143, 1 Beach, Conts. 202, 3 Page. 1307, 9 Cyc. 380, Whart. 785, Clark, Laws., Ham. Conts. 351; cited, §§ 334, 342, Hughes' Proc.; §§ 128-132, Hughes' Conts.

Hendrick stated: Consideration; privity. Consideration need not move from promisee; it is sufficient if it move from a third party.

Hendrick; Cumber; Barker, 2 Denio 45, 43 Am. Dec. 726-740, n., 1 Chit. Conts. 74-78; Dering. See *Res inter alios acta,* etc.; Bassett: 53 Wis. 319; Huff. & W. Conts. 428; National Bk., 98 U. S. 123; Hall, 17 Mass. 575; cited, Chit. Conts.; *Baxter v. Camp,* 71 Conn. 245, 71 Am. St. 176-207, ext. n. (contracts for benefit of a third person), 3 Page 1306-1322, Fanning: 126 Wis. 538, 4 L. R. A. N. S. 667-678, n.; Bourne v. Mason (1669), 1 Ventris, Lang. Conts. 170 (some relationship of succession necessary); Hicks, 144 Mo. 495, 66 Am. St. 431, n. (elements of the contract); 1 Chit. Conts. 74-77 (conflicting views noted). See Lampleigh: 301; Winterbottom; Langridge; Heaven. *Jefferson v. Asch,* 53 Minn. 446, 25 L. R. A. 257-280, ext. n., 39 Am. St. 618; Brower Lumber Co., 28 Or. 565, 52 Am. St. 807: *Linneman v. Moross,* 98 Mich. 178, 39 Am. St. 528-535, ext. n.; West, 39 Kan. 93, 7 Am. St. 530.

Money had and received; privity not essential. Soderberg, *sub,* MONEY HAD AND RECEIVED.

Who may sue. Baxter, *supra;* Pittsfield Co., 71 N. H. 522, 60 L. R. A. 116.

One may buy a thing for a third person, who may sue for an injury caused by the thing bought for him. Langridge; Thomas (drug belladonna case).

Railroad company may take advantage of a contract made by a porter with the Pullman Co. to assume all risks of the service. Russell, 157 Ind. 305, 55 L. R. A. 253, n.

Privity in contract: Matanaphy: 125 Ia. 719, 106 Am. St. 332 n. Liability of abstractor of title to a grantee. Western Co.: 31 Mont. 448, 107 Am. St. 435, n.; Galbraith v. Ill. Steel Co.

A daughter may take advantage of fraudulent representations made her mother by a third person to induce the mother to marry the father. Piper, *sub,* Ashby: 272. *Nullus commodum,* etc.

Power of insured to destroy rights of the beneficiary. Union Ins. Co., 62 Ohio St. 385, 49 L. R. A. 737-755, ext. n. (the power is denied).

And the third person may sue upon such contract. Hendrick, Pom. Rem. 139, 3 Pom. Eq. 1206-1209; U. P. R. R., 4 Colo. App. 325; Howsmon, 119 Mo. 304, 41 Am. St. 654-662: cases; 23 L. R. A. 146; see 2 Gr. Ev. 109; St. Louis, 133 Mo. 561, 54 Am. St. 695; Enos, 96 Wis. 151, 65 Am. St. 38, n.; Tweeddale, 116 Wis. 517, 96 Am. St. 1003 (no consideration necessary from the third person). *Assumption contract not subject to annulment after acceptance by mortgagee with-*

Leading Cases.—319. Hendrick.

out his consent. Gifford, 117 N. Y. 257, 15 Am. St. 508, 6 L. R. A. 610.

Mortgage; rights of mortgagee. Grantee of mortgagor assuming mortgage debt may be sued by mortgagee. Fiske, 124 Mass. 254, 26 Am. Rep. 659; Tiede. R. P. 332, Wilt. Mort. Fore. 225, 2 Warv. Vend. 654, 655; see Pom. Eq. 797; Campbell, 71 N. Y. 26, 27 Am. Rep. 5: cited, 2 Warv. Vend. 659, 2 Dev. Deeds, 1047-1099 (deeds subject to mortgage).

What amounts to an assumption of mortgage indebtedness. 2 Whart. Conts. 786a; Elliott, 108 U. S. 132, 1 Jones, Mort. 735-770; Hopper, 52 Kan. 703, 39 Am. St. 363, n. (contract must be clear and explicit); Boone, 129 Ill. 466, 5 L. R. A. 276, n.

Vendee becomes principal debtor and vendor a surety. 1 Brandt. Sur. 37. See 3 Pom. Eq. 1206-1298, Pom. Rem. 139; 2 Warv. Vend. 654, 671; Green, 54 N. J. Eq. 387, 55 Am. St. 577, n.

One cannot acquire rights under a contract to which he is not a party. 2 Whart. Conts. 784, Ans. 212. This was the former rule. But a stranger could always buy the negotiable instrument; and now, whatever survives or descends to heirs and representatives is assignable. *Assignatus.* Creditor has election of remedies; procedure. 2 Warv. Vend. 660.

Receiver of a telegram may sue for damages caused from non-delivery. West. U. Tel.

Subrogation. Dering. *Novation.* Tatlock.

Municipal contracts for citizens; they cannot sue upon. Fitch, 139 Ind. 214, 47 Am. St. 258, n.

A man cannot incur liabilities from a contract to which he was not a party. Crumlish, 38 W. Va. 390, Huff. & W. Conts. 412 (paying another's debt, formerly not payment).

Generally. 2 Warv. Vend. 658-669, 2 Jones, Mort. 735-670, 2 Dev. Deeds, 1047-1090, 1 Beach, Eq. 455-456; 18 Cent. L. J. 23. Novation. See NOVATION. (Promise to accept commercial paper.)

320. BOSTON ICE CO. v. POTTER (1877), 123 Mass. 28, 25 Am. Rep. 9, Huff. & W. Conts. 243, 438, Laws., Smith 157, n., Whart., Pars., 1 Page 73, Bish., Ham.; §§ 1, 43, 72, 73, 148, Hughes' Conts., Clark, Keener, Quasi C. 229, Ans. 126, n.; stated, 1 Page 73, 1 Benj. Sales, 59, Mech. Sales 267, 268; Arkansas Valley Co., 127 U. S. 379; Mech. Ag., Huffc. Tiff, 1 Benj. Sales.

Cited, §§ 158, 201, 227, 342, Hughes' Proc.; §§ 53, 164, 280, Gr. & Rud.

Boston case stated: Assent is essential for a contract. Potter quit buying ice from the Boston Ice Co. and closed his accounts therewith, and contracted with the Citizens' Co. for his supply. Afterwards, the Boston Co. bought the Citizens' Co., also the privilege of supplying their customers and under this contract recommenced supplying P. with ice, who, not knowing of the change, used the ice. In an action to recover it was held P. was not liable. An important and an instructive plea of assent (*Non hæc in fœdera veni*) as an element of contract will appear from the following quotation:

Leading Cases.—320. Bost. Ice Co.

"One has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Co. could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract, and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. If he had received a notice and continued to take the ice as delivered, a contract would be implied."

Boulton stated: Brocklehurst a manufacturer had been supplying Jones with articles. Brocklehurst sold out to Boulton; of this Jones was not informed, and he sent an order for further supplies, addressed to Brocklehurst, which his successor supplied, and also struck out the name "Brocklehurst" and inserted Boulton's name in the order. An invoice was afterward sent in by the plaintiff to the defendants, who said they knew nothing of him. Boulton sued Jones for the goods sold, and failed for the reasons given in Boston Ice Co., which also quotes this case. 2 H. & N. 564, Finch, Cas. 450, Smith, Conts. 201, Laws. 213, Whart. 180, 184, 854, Ham. Conts. 53, 355, 12 Mews' E. C. L. 568 (sale of goods), British Wagon Co., 5 Q. B. D. 152; 1 Benj. Sales, 608, *q. v.*; 1 Mech. Sales, 267, *q. v.*; Ewart, Estop. 528, Huff. Ag., Tiff.

"Pollock, C. B.: The point raised is, whether the facts proved did not show an intention on the part of the defendants to deal with Brocklehurst. The plaintiff, who succeeded Brocklehurst in business, executed the order without any intimation of the change that had taken place, and brought this action to recover the price of the goods supplied. It is a rule of law, that if a person intends to contract with A., B. cannot give himself any right under it. Here the order was given to Brocklehurst. Possibly Brocklehurst might have adopted the act of the plaintiff in supplying the goods, and maintained an action for their price, but since the plaintiff has chosen to sue, the only course the defendants could take was to plead that there was no contract with him."

"Martin, B.: I am of the same opinion. This is not a case of principal and agent. If there was any contract at all it was not with the plaintiff. If a man goes to a shop and makes a contract, intending

Leading Cases.—320. Bost. Ice Co.

it to be with one particular person, no other person can convert that into a contract with him."

"Bramwell, B.: The admitted facts are, that the defendants sent to a shop an order for goods, supposing they were dealing with Brocklehurst. The plaintiff, who supplied the goods, did not undeceive them. If the plaintiff were now at liberty to sue the defendants, they would be deprived of their right of set-off as against Brocklehurst. When a contract is made in which the personality of the contracting party is, or may be, of importance, as a contract with a man to write a book or the like, or where there might be a set-off, no other person can interpose and adopt the contract. As to the difficulty that the defendants need not pay anybody, I do not see why they should, unless they have made a contract, either express or implied. I decide the case on the ground that the defendants did not know that plaintiff was the person who supplied the goods, and that allowing the plaintiff to treat the contract as made with him would be a prejudice to the defendants."

"Channell, B.: In order to entitle the plaintiff to recover he must show there was a contract with himself. The order was given to the plaintiff's predecessor in business. The plaintiff executed it without notifying the defendants who it was who executed the order, when the invoice was delivered in the name of the plaintiff. It may be that the defendants were not in a situation to return the goods. Rule absolute."

Same case stated in 1 Benj. Sales, 79-81; Bartholomew: 301; Mech. Ag. 600; First Nat. Bank, 101 U. S. 43.

One may choose with whom he will contract. Hall, 47 Mich. 589; Thornton, 38 Mich. 639 (contract cannot arise from the action of one party alone where the other has no power to prevent his action). Bartholomew: 302.

Great cases in contract law. Cooke: 321 (both sides bound, or neither); Boston Ice Co. (mistake); Lampleigh; Bartholomew; Beaumont: 367 (consideration); Cumber: 311 (accord and satisfaction); Swift v. Tyson (commercial paper); Thomson: 342 (agency); Cutter: 308 (entire contract); Pasley: 375; (*Caveat emptor*—warranty); Holman: 363; (illegal contracts); Taylor v. Laird (1856), 25 L. J. Ex. 329; stated, Ans. Conts. 15 (silence does not give consent where offer is not communicated). A contract depends on consent—assent express or implied—or a tort could be enforced. § 35 Hughes' Conts.; Bull. A ship captain resigned during the voyage, and for the remainder acted as a sailor, voluntarily, for which he sued. *Held,* he could not recover.

Statute of frauds cases: Birkmyr: 339 (debt, default or miscarriage of another); Peter: 340 (contracts not to be performed in one year); Wain: 335 (memorandum must express the consideration); Eastwood: 336 (promise to answer for debt, default or miscarriage of another).

Leading Cases.—320. Bost. Ice Co.

Statute of limitation cases: Whitcomb. *Infants:* Craig. See INFANTS.

Drunkards: Gore: 416, *sub,* U. S. v. Drew (criminal liability of). *Aliens:* Griswold. *Insane persons:* Molton: 416.

Contracts. Acceptance and use of a benefit creates no contract to pay for it through a mistake as to the person supplying it. It takes two to make a contract. Mistakes as to person supplying a thing avoids liability to pay for it. Boston Ice Co.; Bartholomew; Cumber; Keech; *Boulton v. Jones;* Mech. Ag. 760; Whart. 438, Ans. Conts. 121, Keener, *Quasi* Conts. 358-360. One has a right to determine with whom he will deal, and to know this one cannot be bound to the whole community. Ans. Conts. 5. This is an essential element, and if lacking, it matters not that goods were delivered and consumed. *Non hæc,* etc. Boston Ice Co. (where Boulton v. Jones is stated at length); Ans. Conts. 125: cases; 1 Beach, Eq. 337. A guaranty to a firm ceases with a change of its members. Barclay v. Lucas; Backhouse, *sub,* Wain: 335; 12 Rul. Cas. 476-482, n.; Foley, 119 Iowa, 457, 97 Am. St. 324 (funeral expenses may be recovered though furnished without request. A request may be implied from the nature of the subject matter).

One cannot make himself the creditor of another without his assent, express or implied. See Hendrick: 319; Ans. Conts. 209; Pars. N. & B. 208.

Under an intention to contract with A., B. himself can have no rights under it. Boulton, supra. A promise may be implied from acceptance of goods or benefits. Wh. Ag. 371. Mistake and failure of consideration will vitiate a contract. 1 Benj. Sales, 606-635. Assent and knowledge essential for a contract. Boston; Cooke: 321; Smout; Huffc. Ag. 183, 185 (fictitious principal); 200 (when neither principal or agent is bound); Ans. Conts. 209.

Duress avoids contracts. Sasportas; Astley; Skeate: 22.

Necessities may be furnished irresponsible persons, for which they will be liable. Peters; *Expressio eorum,* etc.; Wh. Ag. 374.

Certainty; contracts must be certain. Kelley: 304; Kyle: 348; Zaleski: 306; Gordon; Williams: 322. *There must be:* 1. A person able to contract. Molton (lunatics). 2. A person able to be contracted with. Molton. 3. A thing to be contracted for. 4. A good and sufficient consideration, or *quid pro quo.* Rann: 312; Cumber: 311. 5. Clear and explicit words to express the contract or agreement. Wain. 6. The assent of both the contracting parties. Justice, 42 N. Y. 493, 1 Am. Rep. 576, Ans. Conts. 9. See § 4, Hughes' Conts.

Gratuitous services or contributions, however valuable, constitute no contract;

Leading Cases.—320. Bost. Ice Co.

there must, from the inception, be a good or bad contract. Lampleigh; Bartholomew; Mech. Ag. 600: Keener, Quasi Conts. 341-362: cases; U. S. v. Pac. R. R., 120 U. S. 227, Zottman, 20 Cal. 96-107, 81 Am. Dec. 96. See Hitchcock v. Galveston (acceptance of benefit creates an obligation).

Services rendered for relatives are no basis for charge, without contract. Sub, Porter v. Powell; Kessler, 87 Wis. 660, 41 Am. St. 74; Disbrow, 54 N. J. Eq. 343, 33 Am. St. 618; Ellis, 74 Wis. 176, 17 Am. St. 125, n., 4 L. R. A. 55-74; Ulrich, 136 N. Y. 120, 18 L. R. A. 37, n.; Plate, 42 W. Va. 63, 32 L. R. A. 404, n.; Reinh. Ag. 64. A contract to pay a son must be certain and tangible. Zimmerman, 129 Pa. 229, 15 Am. St. 720, n.; Gerz, 162 Pa. 530, 42 Am. St. 842, n.

An agent dealing for himself as an assumed principal cannot in all cases recover upon the contract. Boulton, *supra;* Mech. Ag. 760; Whart. Ag. 432; Thompson: 342.

An alteration by adding names of makers or sureties, etc., to instruments and releasing others, is by this act analogous in doctrine to Boston; 3 Rand. Com. Paper, 1344, 1345. Any material alteration, prejudicial or otherwise, discharges a surety. Abel: Rees: 334.

Payment by a volunteer gives him no rights. Pars. N. & B. 208; Ans. Conts. 209. *Assumpsit will lie for, when.* 2 Gr. Ev. 101-136; Dering. *Agent must accept an agency.* Whart. Ag. 60. *Mutual assent, essentials of.* Cooke; Bish. Conts. 315-334; 2 Kent. 477. *Offer and acceptance.* Cooke v. Boston; Ans. Conts. 11-36; 1 Beach, Conts. 35-71.

The offer must be intended to create, and be capable of creating, legal relations. Offers in frolic or banter, insufficient. Keller, 11 Mich. 248, 83 Am. Dec. 737; Huff. & W. Conts. 71. Marriage the result of frolic or banter is not binding. McClurg, 21 N. J. Eq. 225; Huff. & W. Conts. 72.

Reality of consent essential. Mistake as to the nature or existence of a contract will defeat it. Brown: 347; Kyle: 348; Wheadon: 349. A signature to a note obtained by gross deception without the fault of the maker will avoid such note, even in the hands of a *bona fide* purchaser. Walker, 29 Wis. 194, 9 Am. Rep. 548, Huff. & W. Conts. 238; Williams v. Stoll. Mistake as to the identity of a person with whom the contract is made. Boston.

Mistake as to the subject-matter or the identity of the thing contracted for. Kyle. Of the existence of the thing contracted for. Gibson, 37 Mich. 380, Huff. & W., Conts. 247; Sherwood, *sub,* Zaleski, 306; Hecht, 147 Mass. 335, 9 Am. St. 708, Huff. & W. Conts. 255; Wood, 64 Wis. 265, 54 Am. Rep. 610, Huff. & W. Conts. 257; Rovengo, 40 Cal. 459, Huff. & W., Conts. 261. Of one party as to the intention of the other. Shelton, 70 Ga. 297, Huff. Conts. 262.

Sales; outline citation. Mechem, Sales: Benj.; 1 Chit. Conts. 517-659; 2 Add. Conts. 507-574. Tarling: 404.

Quasi contracts: Implied contracts: Expressio eorum, etc. 1 Beach. Conts. 639-667. See necessaries for infants and married women, the insane and drunkards, and those incapacitated. Whart. Conts. 121. Medical and surgical assistance in cases of personal injuries. Reinh. Ag. 85; Cox, 3 Exch. 268 (authority of general superintendent to employ surgeon), 1 Chit. Conts. 294, 1 Pars. 47, 1 Add. Conts. 119, Sto. Ag. 69, 20 L. R. A. 707, 9 Mews' E. C. L. 927 (Master and servant). In a valuable work (Keener, Quasi Contracts) the subject is discussed under the following heads:

Recovery of money paid under mistake. Keener, pp. 26-159; *Ignorantia facti; Ignorantia juris;* Lambon. See VOLUNTARY PAYMENTS.

Waiver of Torts. Keener, pp. 159-214; Smith: 156; 1 Beach, Conts. 647.

Rights of a plaintiff under a contract. Keener, pp. 214-258; Cutter: 308.

1. When the plaintiff's default, is wilful or inexcusable. Keener, pp. 215-231; Britton; *Nullus commodum capere,* etc.

2. When the plaintiff relies upon the Statute of Frauds. Keener, pp. 231-240.

3. Performance by plaintiff impossible. Keener, pp. 241-258; *Lex neminem cogit ad impossibilia; Actus Dei.*

4. Illegal contract. Keener, pp. 258 *et seq.; In pari,* etc.; Holman: 363.

Obligation of a defendant in default under a contract. Keener, pp. 267-298.

1. Illegality as a defense. Keener, pp. 267, *et seq.; In pari,* etc.; Holman: 363.

2. Contract unenforceable, because of the Statute of Frauds. Keener, pp. 277-292.

3. Contract unenforceable, because of the impossibility of performance. Keener, pp. 292-298; Cutter: 308.

4. Defendant wilfully or inexcusably in default under a contract. Keener, pp. 292 *et seq.; Nullus commodum;* Cutter: 308. *Expressio unius;* 1 Beach, Conts. 403-421.

Recovery for benefits conferred at request, but in the absence of contract. Keener, pp. 315.

1. Benefits conferred as a gratuity, with knowledge of all material facts. Keener, pp. 315-317; Lampleigh; Bartholomew.

2. Services rendered gratuitously under mistake as to a material fact. Keener, pp. 319-326; Bull v. Griswold.

3. Benefits conferred under mistake as to the existence of a contract. Keener, pp. 326-340; White: 303; Smout; Kyle: 348.

Circumstantial evidence of contracts. 1 Beach, Conts. 34; Moller.

Recovery for benefits conferred without request. Keener, pp. 341-362; Lampleigh; Bartholomew; Boston; Garrey, 67

Leading Cases.—320. Bost. Ice Co.

Wis. 512 (physicians attending under mistake of patient may recover).

Recovery for improvements made upon the land of another without request. Keener, pp. 367-373; Bright; Bull; Jewett.

1. Recovery for improvements made while in possession of land under an oral contract which the vendor has refused to perform. Keener, pp. 363-373; Lester: 341; Luton, 127 N. C. 96, 80 Am. St. 783.

2. Recovery by a vendee for improvements made under an oral agreement which he has refused to perform. Keener, pp. 373-377.

3. Recovery for improvements made under mistake as to the ownership of land. Keener, pp. 377-387; Jewett; Bright.

Recovery of money paid to the use of the defendant. Keener, pp. 388-410.

Recovery of money paid to prevent a sale of property. Keener, pp. 388-395; Astley; Lamborn. See VOLUNTARY PAYMENT.

Right of a plaintiff who has paid a claim which, as between the plaintiff and defendant, should have been paid either in whole or in part by the defendant. Keener, pp. 395-410; Dering; Merryweather.

Gift made to one affianced to marry may be recovered. Thornton Gifts: 94.

Recovery of money paid under compulsion of law. Keener, pp. 421-425.

1. A recovery of money after action brought. Keener, pp. 411-421; Mariott.

2. Recovery or money paid to prevent a threatened sale of property under legal process. Keener, pp. 421-424; Sasportas, Lamborn. See VOLUNTARY PAYMENT.

Recovery of money paid to the defendant under duress, legal or equitable. 1. Recovery of money paid to prevent the unlawful taking or detention of property. Keener, pp. 326-441; Sasportas; Skeate; Astley.

2. Recovery of money paid to avoid an injury to business. Keener, pp. 430-436.

3. Recovery of money paid under a usurious contract. Keener, pp. 436, 437.

4. Recovery of money paid to induce the performance of a duty. Keener, pp. 437, 438; Stilk; Am. Steamship Co. See EXTORTION.

5. Recovery of money paid to avoid arrest or to be released therefrom. Keener, pp. 438-441; Grainger; Watkins; Sasportas.

Criminal process cannot be used for ulterior purposes. *Sub, Salus populi,* etc. Ilsley; Watkins; DURESS.

Money had and received; action of. See *Id.*

321. COOKE v. OXLEY (1790), 3 Term Rep. (D. & E.) 653, 1 R. R. 783, 1 Langd. Cons. 2, Finch, Cas. Cons. 85, Keener, Sel. Cas. 201, Ans. 21, 27, 1 Add. 20, Pars., Chit., Bish., 1 Beach, 37, Clark, Story, Smith, 158-164, Whart. 11, 13, 494, 787, Ham. 165, 314, Hughes, 1 Benj. Sales, 41-66, 1 Mech. 245, 252, 9 Cyc. 328, Wambaugh, Study Cas. 103, Mews'

Leading Cases.—321. Cooke.

E. C. L.; Cooper, 94 Mich. 272, 34 Am. St. 341, Huff. & W. Conts. 50.

Cited, § 104, Hughes' Proc.; §§ 40, 281, 305, 313, Gr. & Rud.

Cooke stated: contracts; offer and acceptance. O. offered C. 266 hogsheads of tobacco, who asked until 4 o'clock next day for acceptance, which was agreed to. O. immediately withdrew the offer and notified C., who accepted the offer within the time, and then sued O. for non-delivery, but lost the suit for the reason that no consideration was given for the time offer, and because both sides must be bound, or neither; that O. could retract the offer at any time before its acceptance. Mutual assent is essential for a contract.

1 Benj. Sales, 38, 74; White v. Corlies; Tarling v. Baxter; 9 Cyc. 285.

The procedure in Cooke. The declaration stated that the defendant had *proposed* to sell and deliver to the plaintiff goods upon certain terms, if the plaintiff would agree to purchase them upon those terms, and would give the defendant notice thereof before 4 o'clock on that day. Averment, that plaintiff did agree and gave the required notice, but defendant on request did not deliver. After verdict, the judgment was arrested, and a writ of error having been brought, that decision was affirmed, on the ground that it appeared by the record that there was only a proposal of sale by one party, and no allegation that the other party had acceded to the contract of sale. 1 Chit. Conts. 14 (11th Am. ed.).

It is instructive to note that a case must be alleged, and that the allegation—the pleading is construed against a pleader. Dovaston: 217.

Offer under seal irrevocable, for a seal imports a consideration. Ans. Conts. 12, 17, 20, 25. 1 Mech. Sales, 259; Jackson v. Cleveland.

Both sides must be bound or neither: unilateral contracts are not binding. Emerson, — Minn. —, 1 L. R. A. N. S. 445-451, n.; Higbee: 211 Ill. 333, 103 Am. St. 204, 39 L. R. A. 467; 9 Cyc. 327: cases; 12 How. 126, 136; Tyler v. Pomeroy.

Bish. Conts. 318, 6 L. R. A. 807; Atlee, 69 Wis. 43, 5 Am. St. 103; Johnston, 7 Watts, 48, 32 Am. Dec. 738; Hayes, 149 Ill. 403, 23 L. R. A. 555-560, n. (unilateral contracts); 1 Mech. Sales, 263-265. See Boston R. R., 3 Cush. 228 (*Ut res magis valeat*), Boston R. R.: 331. An adult contracting with an infant is bound, but the latter is not. See INFANTS.

A proposal may be retracted before acceptance. Bish. Conts. 325; Payne: 307; Lincoln, 164 Mass. 537, 49 Am. St. 480 (trying on a dress made inside out is not acceptance). "Refusal" or "option" contracts; rights conferred by. Litz, 93 Ky. 185, 21 L. R. A. 127-133, n. Right to withdraw from until a consideration is paid. Mueller, 116 Wis. 468, 96 Am. St. 997 (follows Cooke).

Leading Cases.—321. Cooke.

Mutuality; unilaterial contracts; specific performance of, when decreed. 2 Beach, Eq. 586, 587, 637.

An offer made and accepted is a good contract. Ex nudo, etc.

A former subscriber for a periodical continuing to receive it is liable for it. Fogg, 44 N. H. 115, 82 Am. Dec. 191, Huff. & W. Conts. 10; Weatherby, 5 C. & P. 228 (24 E. C. L. R. 293). See CONTINUITY. Renewal of leases by holding over is very analogous to the foregoing. Clayton. *Expressio eorum,* etc.

One may repudiate an illegal contract and retire from it at any time. Pactis privatorum. Bro. Max. 695. In law one is never bound by an illegal contract, and it is his duty to abandon it. Diggle: 371.

322. WILLIAMS v. CARWARDINE (1823), 4 Barn. & Adol. 621 (24 E. C. L. R.), 5 Car. & Payne 566, 1 N. & M. 418, 6 Rul. Cas. 133-230, 9 Cyc. 326, Gr. Pub. Pol. 444: cases, Langd. Conts. 12, Keener, Sel. Cas., 1 Ans. 33, 1 Chit. 12, 2 *id.* 800, Laws. 12, 36, 1 Add. 32, Whart. 24, 507, Sto. 493, Clark, 58, Ham. 79, Huff. & Wood, Am. Cas. 62, Ewart, Estop. 377, 1 Mews' E. C. L. 188, 4 *id.* 3, 4; Fitch, 38 N. Y. 248, 97 Am. Dec. 791; cited, 1 Dill. Corp. 139; 9 Cyc. 326.

Williams stated: C. published that he would give £20 to any person who would give information leading to the conviction of the murderers of C.'s brother. W., a female, being maltreated by a man she was living with, from motives of revenge gave the information required by C. She sued for the reward, and C. insisted that her motives were not contractual. *Held,* she could recover; that her motives were immaterial. Williams; Mountain, 16 Or. 279, 10 Crim. Law Mag. 662-682, ext. n.; Smith v. Vernon, 188 Mo. 501, 70 L. R. A. N. S. 59: cases; 107 Am. St. 324; 1 Beach, Pub. Corp. 618; Mitchell, 86 Me. 338, 25 L. R. A. 503 (presumption of revocation of offer by lapse of time—forty-four months too late for performance); Loring, 7 Met. 409; Central R. R., 85 Ala. 292, 7 Am. St. 48, n.

P. offered a reward of $1,000 for the apprehension and conviction of the murderers of several persons. F. gave the information leading to this result. *Held,* that he could recover. Furman v. Parke (1848), 21 N. J. L. 310; Hayden, 56 Ind. 42, 26 Am. Rep. 1-10, n. (who entitled to); Wilson, 103 Cal. 255, 42 Am. St. 111, n.

Towns and counties can only offer rewards when authorized by statute. 1 Dill. Corp. 139. Hill v. Boston: cases. Contracts of, are strictly construed. 1 Beach, Corp. 618. *Quasi*-municipal corporations are governed by strict rules. See ULTRA VIRES.

Contracts; rewards. Proposals to unascertained persons. Cooke, 321; Boston Ice Co.: 320.

Any person may arrest a fugitive for a felony actually committed. Allen v. Wright; and this is the duty of every good citizen. *Salus populi suprema lex.*

Leading Cases.—322. Williams.

Yet, for doing it a reward may be claimed. See Stilk. It is no consideration for a man to do what in law he is already bound to do. Stilk. Public officers cannot claim for arresting. Kinn, 118 Wis. 537, 99 Am. St. 1012; 1 Page 22-53; Smith v. Vernon County.

Contractual intention. Ham. Conts. 78-86.

One claiming an award must fully comply with its terms. If offered for arrest and conviction no claim can be made for the conviction only. Williams, 191 Ill. 610, 85 Am. St. 278; *Expressio unius,* etc. Cutter: 308.

323. SHUEY v. U. S. (1875), 92 U. S. 73, 23 L. ed. 697; Pollock, Conts. 21, Pars. 490, Bish. 331, 332, Whart. 24, 25, Clark, 57, Laws. 26, Ham. 63, 67, Hughes, 1 Dill. Munic. Corp. 139, 1 Wh. Ev. 674; 1 Page 35.

Shuey stated: Abraham Lincoln, President of the United States, was assassinated April 14, 1865, by J. Wilkes Booth and accomplices, among whom was one John H. Surratt. On the 20th of that month the Secretary of War offered $25,000 for the apprehension of Surratt, and also as follows: "Liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices." There was no limitation as to time. On November 24th of that year the President revoked the offer for the arrest of Surratt (13 Stat. 778).

In April, 1866, Surratt and claimant were zouaves in the military service of the papal government. During the month he communicated with Mr. King, the American miniser at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his complicity in the assassination. Claimant communicated further information to the same effect and kept watch, at the request of the American minister, over Surratt. This led to his arrest.

Ten thousand dollars had been paid claimant for the information furnished. *Held,* claimant could not recover the $25,000 because he did not "apprehend Surratt"; he only gave information which led to the "apprehension"; the consequences of a man's act are not his acts. There is a clear distinction between "apprehending" and giving information leading to an "apprehension."

That power to make an offer involves the power to withdraw it. *Nihil tam conveniens,* etc.

That the claimant did not perform the thing required, nor was the arrest made while the offer was extended. Adams: 326.

That the offer could be revoked at any time before performance. Payne: 307; Cooke: 321.

That it was sufficient to revoke the offer by the same means that it was made, that is, through the public press. *Nihil tam conveniens,* etc. Things equal to the same thing are equal to each other.

Leading Cases.—323. Shuey.

That a proposer can prescribe time, place and manner of acceptance. Adams: 326; Eliason; Felthouse; Maclay: 327.

That it takes two to make a contract, and both sides must be bound or neither. Cooke; Jordon; Kyle: 348.

And until both are bound either can retract. Cooke; Adams: 326.

Rewards; proposals to unascertained persons. Williams.

324. JORDAN v. NORTON (1838), 4 Mees. & Wels. 155, 1 H. & H. 234, 6 Rul. Cas. 142-230, n., 1 Mech. Sales, 227-238, Pars., Chit., Smith, 158, Whart. 4, Clark, 36, Laws. 16, Add., Hughes' Conts., Mews' E. C. L. 420, 1 Benj. Sales, 29.

Jordan stated: Contracts; sales; offer and acceptance. Norton offered, by letter, to buy a mare of Jordon if he would warrant her "sound and quiet in harness." J. replied, warranting her "sound and quiet in double harness," but saying he had never put her in single harness. J.'s agent delivered the mare and exceeded his authority by failing to first get the price. N.'s son got the mare as if on trial, rode her 18 miles, tried her and returned her after two days as unsound under the warranty demanded whose act was immediately repudiated. The mare would not work in single harness. J. refused the return of the mare and sued for the price, and the question was whether or not there was a complete contract. *Held,* there was not. See Tarling: 404; Page Conts. 46.

Both parties must understand the same thing in the same sense; and both sides must be bound, or neither. Cooke; Kyle; Welborn.

It takes two to make a contract. Cooke. And these two must have agreeing minds as to the essentials. Boston Ice Co. An offer must be assented to in the precise terms in which it is made. First Nat. Bank, 101 U. S. 43 (acceptance must be identical with offer). The principle in *Non hæc in fœdera veni* applies.

An offer that has been rejected cannot be revived by a tender of a full acceptance. Minneapolis, etc. R. R., 119 U. S. 149. Acceptance in the law of sales. See Tarling: 404: cases. Of deeds. Welborn: 388.

Acceptance of less than the offer concludes the contract for the less amount. *Omne majus,* etc.; *Quod minus,* etc.

324a. VOGT v. SCHIENBECK (1904), 122 Wis. 491, 100 N. W. 820, 106 Am. St. 989.

Sale, wherein the seller agrees to load the thing sold "f. o. b." means that he will secure or furnish the car. *Expressio unius,* etc. Parties must make contracts for themselves; the contract made is all that can be enforced.

Oral evidence is inadmissible to alter or vary the contract. Pym: 52: cases; Hogins: 379. See ORAL EVIDENCE.

Custom cannot be shown to affect plain and unambiguous language. Blackett: 400; Noble: 251.

Leading Cases.—

325. FELTHOUSE v. BINDLEY (1861), 11 C. B. (N. S.) 869 (103 E. C. L. R.), Ans. 15, Keener, Sel. 148, Finch, Cas. 51, Ham. 42, 43, 77, 1 Pars. 503, 1 Add. 20, Whart. 21, 22, Clark, 31, Laws. 19, 31, Hughes' Conts., 2 Whart. Ev. 1138, 1 Mech. Sales, 234, 238, 1 Benj. 39, 12 Mews' E. C. L. 419, 444.

Felthouse stated: F. had offered B. £30 for a horse, while 30 guineas was asked. B. afterward, on Jan. 2d, offered to split the difference, the horse to be delivered on March 25th, and also: "If I hear no more about him I consider the horse is mine at £30, 15s." No reply, however, was sent. B. on Feb. 21st had an auction sale and ordered everything sold except the horse, which he said was F.'s. But by mistake the horse was sold, and F. sued in trover for him. *Held,* F. could not recover. Proposer may prescribe time, place and manner of acceptance. Adams; Eliason, *sub,* Cooke: 321.

An offer made and accepted is a contract: Cooke: 321; *Ex nudo.*

326. ADAMS v. LINDSELL (1818), 1 Barn. & Ald. 681, 1 Lang. Conts. 4, 6 Rul. Cas. 80-220, n., 17 R. R. 415, Finch, Cas. 102, Mech. Sales; stated, Benj. Sales, Wambaugh, Study Cas. 106, Keener, Sel. Conts. 225, Ans. Laws. 1 Chit. 1 Add., Smith, Whart., Clark, Sto., 1 Pars. 500-503 (instructive), Hughes' Conts., page 52, Dunlop v. Higgins (1848), 1 H. L. Cas. 381, 9 Eng. Rep. 805, Langd. Conts. 24-352; cited, 4 Mews' E. C. L. (Contract—Formation of), Sto. Ag. 493, 69 Wis. 48, 5 Am. St. 108, 2 Kent, 477.

Cited, p. 39; §§ 1, 3, 4, 5, 23, 39, 41, 95, 207, Hughes' Proc.

Adams stated: Lindsell offered to sell a quantity of wool at a stated price to Adams & Co.; acceptance was requested "in course of post." L. sent the letter to Bromsgrove in Worcestershire, instead of in Leicestershire. This delayed the letter several days. However, upon its receipt, A. immediately accepted. Because of this delay L. refused to perform, insisting that he had a right to retract at any time until notified of an acceptance. *Held,* L. was bound; that the delay was caused by his own mistake, and of this he should not complain. Patrick v. Bowman; *Nullus commodum capere,* etc.; "Squib case." The doctrine of continuity is applied in the law of contracts. See CONTINUITY.

Byrne v. Van Tienhoven (1880), 5 C. P. D. 348 (a widely cited case); Finch, Cases, 104; Ans. Conts. 27: Whart. Conts. 18; 4 Mews' E. C. L., 9 (Contract—Formation of), 6 *id.* 679; 1 Benj. Sales 46; Ham. Conts. 66.

Byrne stated: V. at Cardiff, on Oct. 1st wrote a letter offering to sell a cargo of tin to plaintiff, at New York, asking for acceptance by letter. Ten days later the letter was received and was duly accepted, as requested, by letter. On the 8th V. had posted a letter revoking the offer. Two questions arose:

1. Whether the withdrawal of an offer has any effect until it is communicated to

Leading Cases.—326. Adams.

the party to whom the offer has been made.

2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent. *Held:*

"that both legal principle and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding upon both parties." Tayloe; Patrick v. Bowman; *Allegans*, etc., 9 Cyc. 295.

Contracts by post. Acceptance of offer must be unqualified. Maclay; Household Ins. Co.; Borland; Boston R.; Eliason; Felthouse; Tayloe; Shuey; Williams v. Carwardine (consent); Patrick.

Death of offerer revokes the offer. Dickenson v. Dodd, 2 Chan. Div. 463, 475, 1 Pars. C. 499, 1 Chit. 18, 4 Mews' E. C. L. 10, 6 *id.* 679, 14 *id.* 1113. 1 Page, 34, 36.

Death causing lapse of offer. 1 Page, 40.

Or insanity. Beach, 96 Ill. 177, 1 Pars. Conts. 499.

Right to withdraw acceptance. No contract until letter is delivered; if intercepted there is no contract. Scottish Co., 96 Tex. 504, 97 Am. St. 932 n.

327. MACLAY v. HARVEY (1878), 90 Ill. 525, 32 Am. Rep. 35-53, ext. n., Huff. & W. Conts. 41; Mech. Sales, Laws., Ham. Ans., Pars., Bish. 327, 1 Beach, 64, Hughes.

Maclay stated: H., a merchant, wanted a milliner and sought the services of Miss M. in a neighboring town. He wrote by post, offering her a position and requesting her acceptance by return mail. She wrote her acceptance on a postal card and intrusted the posting of it to a boy, who failed to promptly do so. From this cause the letter was delayed, and she lost the situation. *Held,* there was no contract; that the contract failed from her own fault, and that she could not take advantage of this. *Nullus commodum capere,* etc. M. trusted the boy, and therefore must first suffer. Lickbarrow: 294.

Proposer may prescribe time, place and form of acceptance. Felthouse: 325. The last proposition involves the fundamental right to contract; it is a part of *Non hæc in fœdera veni.* This is a part of the prescriptive Constitution. Where this is denied tyranny begins. Cutter: 308.

Letters. Acceptance of proposal by letter. Adams; Household Ins. Co.; Tayloe; Welborn: 388.

Contracts by telegram; letter. 1 Beach, Conts., 62-64; Byrne: 326; Adams; Larmon; 50 Ill. 204.

328. HOUSEHOLD FIRE INSURANCE CO. v. GRANT (1879), 4 Exch. Div. 216, 6 Eng. Rul. Cas. 93-230; Williston Cas. 481, Finch, 133, Ans., Pars., Whart., Laws. 21, Clark, 44, 45, Keener, Sel. 259, Ham. 46, 47, Hughes, Mech. Sales, Benj. Sales, 2 Wh. Ev. 1323, Mews' E. C. L.

Contracts; acceptance of proposals by post. Acceptance is complete when letter is posted, if that way of acceptance is the one contemplated by the proposer.

Leading Cases.—328. House Ins.

Household; Adams; Maclay; Tayloe. See Vassar, 11 N. Y. 441; M'Cullough, 1 Pick. 278.

Consent to contracts. 6 Rul. Cas. 80-230; Jordan; Williams; Boston: 320-322.

329. TAYLOE v. MERCHANTS' FIRE INS. CO. (1850), 9 How. 390, 13 L. ed. 187, Langd. Cas. 106, Huff. & W. Conts., Pars., Chit. 18, Ans. 24, Bish. 326, 328, 1 Beach, 39, 586, Ham., Hughes' Conts., Mech. Sales, Rorer Interstate Law 67, 3 Suth. Dam. 810, 820, 2 Sto. Eq. 722, 2 Kent, 477. § 152 Gr. & Rud.

Acceptance of an offer must be upon precise terms offered. Expressio unius, etc. Jordan; Eliason; Cooke.

Contracts; letters; contracts by post. Adams; Maclay; Household; 1 Bish. Conts. 62-64.

330. ELIASON v. HENSHAW (1819), 4 Wheat. (U. S.) 225, 4 L. ed. 556, n., 1 Langd. Cas. 70, Huff. & W. Conts., Fish. 56, 38 Bish. 323, 1 Pars. 19, 20, n., Whart. 4, 9, 15, Sto. 502, Clark, 36, 39, Laws., Ham., Hughes, Keener, Sel. Cas. Conts. 153, Mech. Sales, *q. v.,* 31 W. Va. 738, 3 L. R. A. 100.

Contracts. Proposer may prescribe time, place and form of acceptance. Adams; Cooke.

Offer and acceptance. 4 L. ed. (U. S.) 556, n.

Acceptance must be perfect. Bish. Conts. 323, 3 L. R. A. 100; White: 303; Boston Co.: 320.

331. BOSTON & MAINE R. R. v. BARTLETT (1847), 3 Cush. 224 Langd. Conts. 103, Pars., Whart., Laws., Sto. 495, Clark, Ham. Conts., Hughes' Conts., Mech. Sales.

Boston stated: B., in the above case, offered his land to the R. R. for $20,000, if acceptance was signified in thirty days, which was done. Then B. undertook to revoke and withdrew, but it was *held* too late.

Contracts; acceptance; proposal cannot be retracted after acceptance. Adams; 1 Chit. Conts. 11, 13, 16; Cooke: 320.

Acceptance of proposal must be unequivocal. Weaver, 31 W. Va. 736, 3 L. R. A. 94; stating, Boston; Eliason.

A seal imports a consideration. Boston, *sub,* Cumber, *sub,* Cooke; Rann: cases.

332. BAINBRIDGE v. FIRMSTONE (1838), 8 Adol. & El. 743 (35 E. C. L. R.), 1 P. & D., 2 W. & H. 600, Langd. Conts. 209, Finch, 363, Laws. 93, Smith, 178, 189, Whart. 517, Sto. 448, Clark, 148, 150, Ham., Hughes, Keener, Sel. Cas. Conts. 383, 1 Pars. 463, 1 Chit. 31, Ans. Conts. 71, Wambaugh, Study Cas. 60, 9 Cyc. 366, 4 Mews' E. C. L. 90 (Contracts —Parties to).

Cited, §§ 283, 284, Gr. & Rud.

Bainbridge stated: F. desired to weigh two boilers belonging to B., who consented that F. take, weigh and return them in good condition. F. took them to pieces to weigh them and returned them so taken apart. For this B. sued F. F. denied the sufficiency of the consideration. *Held,* B. could recover. Mere trust and confidence is a sufficient consideration. Coggs: 350.

If one gets all he bargained for this satisfies

Leading Cases.—332. Bainbridge.

the law, 39 Am. St. 744. *The immunity of one's right to make any contract he pleases, even to contract against accident (Actus Dei,* etc.) *and impossibility (Lex non cogit,* etc.) *depends upon the rule in Bainbridge.* See Thornborow: 333; Cutter; *sub,* Cas.; also *Modus et conventio,* etc. Hughes' Conts.

Consideration. Adequacy of, immaterial. It is sufficient if of the slightest benefit to the promisor or detriment to the promisee. Add. Conts. 16; Cumber: 311; Thornborow; Bartholomew; 39 Am. St. 735-745; Train v. Gold, 5 Pick. 384; Cabot, 3 Pick. 83; cited, 1 Chit. Conts. 31.

In the absence of fraud, abstinence from drink or tobacco, the naming of a child, or the performance of any act that will afford a gratfication of mere caprice, whim, pleasure or fancy, or express an appreciation of a service another has done him, such estimate of the value should, in the absence of fraud, be left undisturbed. Wolford, 85 Ind. 294, 44 Am. Rep. 16; 39 Am. St. 744: cases. *Ex nudo pacto,* etc.; 102 Am. St. 303-315.

The law of consideration should be gathered from a connected consideration of the maxim, *Ex nudo pacto,* etc., *Lampleigh, Bartholomew, Cumber, Rann, Stilk, Cook, Mills, White, Beaumont, Hendrick, Bainbridge and Thornborow.* When the law will presume the request and the promise are questions of contract and of procedure. See Lampleigh: 301. A study of these elements although technical is of leading consequence to him who would learn contract, and perceive its interactions upon procedure.

333. THORNBOROW v. WHITACRE (1706), 3 Ld. Raym. (Eng.) 1164; Pars. Conts., Chit., 1 Add. 327, 491, Smith, 178, Whart. 301, Leake, 688, Sto., Clark, 182, Hughes' Conts., 2 Sto. Eq. 1303, Benj. Sales, Sedgk. Dam., 1 Suth. Dam. 285, 33 Am. Rep. 182.

Thornborow stated: Agreement to pay one barley-corn for first nail in horse's shoe, increasing it in a geometrical progression, *held* valid. Mere folly or weakness in judgment will not defeat the contract. Thornborow; 2 Chit. Conts. 30, 1332. Smith, Conts.

If an agreement be unconscionable, the court will render judgment for such damages as may appear reasonable without being bound by the terms of the contract. 1 Chit. Conts. 30 n.

W., for £25, agreed to give T. one rye corn on Monday, two on the second Monday, four on the third, and so on, doubling for each Monday in next ensuing year. Although this called for more rye than was grown in all England for that year, it seems that such a contract is valid. Thornborow. 1 Chit. Conts. 30, Smith, 178, Whart. Conts. 301. Disparity of intellects of contracting parties will not be inquired into. Chesterfield.

Consideration, adequacy of. A slight consideration will support a heavy obligation. Thornborow; 2 Pom. Eq. 925-928; Kerr, Fraud, 186-194, 2 Sedgk. Dam. 611 Adams, Eq. 245; Cumber; Bainbridge; *Ex nudo pacto,* etc.

Leading Cases.—333. Thornborow.

Of inadequacy of consideration. Bigl. Fraud, 136-140: cases (illustrations). 1 Page, 224-235. Two dollars no consideration for $2,000. Macoupin, 58 Ill. 191, Madison Co., 58 Ill. 456, 2 Pom. Eq. 925-958, Kerr, Fr. 186-194; Skeate; Horne; *Sub,* Chesterfield.

Execution sale of property en masse; $2,000 *worth for* $60 *is ground for relief.* Lurton, 139 Ill. 554, 32 Am. St. 214, n.; Schroeder, 161 U. S. 334 (grounds for setting aside), Smith, Conts. 180, Whart. 301.

James v. Morgan (1657), 1 Levinz (Eng.), 111, 1 Keb. 569, 1 Pars. Conts. 453, 2 Pom. Eq. 927, 2 Benj. Sales, 867, 2 Sedgk. Dam. 612, 1 Chit. Conts. 30, 1323; *Haigh, sub,* Cumber: 311; *Schnell v. Nell* (1861), 17 Ind. 644, Ham. Conts. 323, 324, 338, 343; South, 98 Ala. 40, 39 Am. St. 72-82, n.: cases (specific performance case; *Huguenin*). *Catching bargains. Chesterfield.*

334. ABEL v. ALEXANDER (1874), 45 Ind. 523, 15 Am. Rep. 270-277, 2 Brandt, Sur. 344, 2 Rand. Com. Paper, 958, 966, 2 Danl. Nego. Insts. 1317, 1317*a*, 1319. §§ 186, 305, 334, 342, Hughes' Proc.

Abel stated: Alexander was payee and holder of Abel's overdue note, bearing usurious interest and secured by sureties. Without the knowledge of these, the holder agreed with the maker for two extensions of time, one "until summer" and the other "until fall" (June 1st and September 1st), maker to pay same rate of interest. Later, the holder sued, and the sureties pleaded their discharge upon the ground that the contract had been changed as above stated. *Held,* that the contract was certain as to time; that "until summer" meant June 1st, etc.; that it was no consideration to agree to do what the maker was already bound to do (Cumber; Stilk). Therefore, the sureties were not discharged. *Cf.* Benson, 87 Tex. 578, 47 Am. St. 128 (an agreement to keep the money and pay interest for a time certain is sufficient). A subsequent agreement must be upon a new consideration. McFarland, 127 Mo. 327, 43 Am. St. 629. Cumber; *Ex nudo pacto,* etc.

Sureties. Discharge of, by change of contract between principal debtor and creditor. *Rees; King; Okie v. Spencer* (accepting from principal a check post-dated six days releases surety).

Discharge of the surety or guarantor by alteration of the contract. 2 Brandt, Sur. 378-400, King; Rees. A perfect and valid enforceable contract essential. Abel: 2 Rand. Com. Paper, 959; Sanders, 32 S. C. 2, 3, 7 L. R. A. 423, n. (that the contract was beneficial is immaterial); Bartholomew.

Integrity of contract favored. Certum est quod certum reddi potest (that is sufficiently certain which can be made cer-

Leading Cases.—334. Abel.

tain), applies with great force in commercial paper. 2 Rand. Com. Paper, 958; Crooker: 410; Kelley: 304.

Ut res magis valeat quam pereat applies with strictness to commercial paper. Abel; Crooker; *Verba fortius*, etc.

Res inter alios acta; Bro. Max. 697, 954; *King; Rees.*

Assent essential for a contract. Boston: 320. And it matters not that benefits were received. Bartholomew: 302; Bull. See Hitchcock v. Galveston. *Non hæc in fœdera veni.*

Discharge of the surety or guarantor by giving of time. 2 Brandt, Sur. 342-377.

Neglect of principal to promptly and prudently proceed will not release surety. Montgomery, 100 Cal. 132, 38 Am. St. 271, n.; King; 3 Suth. Dam. 722-767.

334a. REES v. BERRINGTON (1795), 2 Ves. Jr. 540, 2 Lead. Eq. Cas. 1867-1921 ext. n., 30 Eng. Rep. 765; Chit. Conts., Add., Jones, Construc. 552 (sureties are favorites in law), Dev. Deeds, 1057, 87 Tex. 581, 4 Am. St. 130, 2 Rand. Com. Pap. 960, 2 Danl. Nego. Insts. 1336, Pars. N. & B., Brandt, Suretyship, Pom. Eq., Bisph. Eq., Sto. Eq., 3 Suth. Dam. 739, 11 Mews' E. C. L. (*Expressio unius*).

Cited, §§ 186, 227, 305, 334, 342, Hughes' Proc.; § 281 Gr. & Rud.

Sureties; release of sureties by the creditor. Giving time to the debtor without the sureties' consent releases them. *Rees; Okie v. Spencer* (1836), 2 Whart. (Pa.) 253, 1 Miles (Pa.), 299, 2 Am. Lead. Cas. 253, 30 Am. Dec. 251, Redf. & Bigl. L. C. N. & B. 547. Rand. Com. Paper, Pars. N. & B., Brandt, Sureties; Bugh, 26 Ind. App. 465, 84 Am. St. 307, n.

Accepting from principal a check post-dated six days, suspends right to sue and releases surety. Brandt, Sureties, 364; note, 55 Am. St. 874: cases; Abel: 334.

Creditor may reserve his right against the surety. Rockville: 58 Conn. 526, 18 Am. St. 293, n. Saint v. Wheeler, 95 Ala. 362, 36 Am. St. 210, n. (guaranty and suretyship, distinctions).

Non hæc in fœdera veni (I have not come into this compact) is the motto of sureties. Bro. Max. 654; *Expressio unius*, etc. *Miller v. Stewart* (1824), 9 Wheat. 680 (sureties are favorites in law); U. S. v. Freel (1902), 186 U. S. 309, 3 Suth. Dam. 725; Abel: 334.

334b. KING v. BALDWIN (1817), 2 Johns Ch. 534, 17 Johns. 384, 2 Am. Lead. Cas. 364-425, ext. n., 8 Am. Dec. 415-428, n.; Rand. Com. Paper, Danl. Nego. Insts., Pars. N. & B., 2 Pars. Chit. Conts., Pom. Eq., Sto. Eq., Bisph. Eq., Suth. Dam. (sureties).

Cited, §§ 184, 186, 227, 305, 334, Hughes' Proc.

King stated: Fowler gave his note, with Baldwin as surety, to King, who was a lenient creditor and who refused to sue F. at the repeated requests of B. Long afterward, F. became insolvent, and then K. sued B., who made defense that K. had neglected too long to sue, and that by this B. was released. *Held,* mere delay or indulgence to the principal will not release a surety. Mere forbearance to

Leading Cases.—334b. King.

sue, however prejudical to the surety, will not release him. *Rees;* Alley, 98 Ky. 668, 56 Am. St. 382, n.

Nor to enforce a mortgage given by surety to creditor. Carver, 116 Cal. 116, 58 Am. St. 156, n.

But if creditor binds himself to delay, this will discharge a surety. M'Dougall, 15 Wash. 76, 58 Am. St. 870, n.; cases: Abel: 334.

Accepting interest in advance will release. Lime Rock, 34 Me. 547, 56 Am. Dec. 673, n.

Obligations of sureties are strictly construed. They are favorites in law. *Miller v. Stewart,* 2 Suth. Dam. 480, 3 *id.* 725, 1 Brandt, Surety, 93, 393, Jones, Construc. 246-256, 2 High. Injunc. 1638-1640, 1 Beach, Injunc. 227-245: Independent School District, 110 Iowa, 58, 80 Am. St. 271, n.

Are not liable for void acts of officers. M'Lendon v. S. (1893), 92 Tenn. 520, 201, 21 L. R. A. 738, ext. n.; Marquis, 12 Wash. 528, 50 Am. St. 906; Allison v. P. (1895), 6 Colo. Ap. 80 (describing one in a warrant as an "unknown person" avoids the warrant, and sureties not liable to those arrested under it). See S. v. McDaniel (1900), 78 Miss. 1, 84 Am. St. 618: cases.

Guaranty of interest on unmatured note ends with its maturity. Rector, 61 Ark. 420, 54 Am. St. 271, n. See GUARANTY.

335. WAIN v. WARLTERS (1804), 5 East, 10, 2 Smith, Lead. Cas. 271-292, 8th ed., 11th ed. (reviews English cases), 6 Rul. Cas. 280-325, n., Benj. Sales, 3 Kent, 122, 123, 12 Rul. Cas. 464, 469, 60 Am. St. 433, Ans. Conts., Laws., Clark, Sto., Smith, 77-80, Ham. 304, Hughes, Bish., Pars., Beach, 2 Page, 701-702, Brandt, Suretyship, Baker's Sales, Browne, Stat. Frauds, Fell, Guaranty, Rand. Com. Paper, 2 Danl., 2 Pars. N. & B., Bro. Max. 888.

Cited, §§ 24, 112, 176, 186, 227, Hughes' Proc.; §§ 164, 280, 286, 288, Gr. & Rud.

Wain stated: Statute of frauds. Warlters, to give Hall credit, wrote Wain & Co.: "Messrs. Wain & Co., I will engage to pay you by half past four this day £56 and expenses on bill, that amount on Hall. (Sig.) Jonathan Warlters, No. 2 Cornhill, April 30th, 1803." Afterward Warlters was sued on this, and he defended that, no consideration being expressed, the contract (instrument) was insufficient. Held, that this was a good defense. That Hall, being already indebted to W. & Co., the collateral undertaking of Warlters was not valid, unless the consideration was expressed. Louisville Asphalt, 29 S. C. 533, 2 L. R. A. 212, n.; Siemers, 65 Minn. 104, 60 Am. St. 330, 421, ext. n.

D'Wolf v. Rabaud (1828), 1 Pet. 476 (a widely cited case); Barry v. Coombe (1828), 1 Pet. 640, 7 L. ed. 295, n., 3 Pars. Conts. 15-17; Mentz, 122 N. Y. 491, 19 Am. St. 514, n., 11 L. R. A. 97-101, n. (essentials of memorandum).

Leading Cases.—335. Wain.

Sufficiency of the memorandum. Nelson, 96 Ala. 515, 38 Am. St. 116, n.; Lee, 85 Tenn. 707, 4 Am. St. 800, n.; Wardell, 62 Mich. 50, 4 Am. St. 814.

Memorandum; its essentials: 1. A contract concluded by the signer; 2. Names of both contracting parties; 3. Subject-matter with certainty. 4. If a sale, its terms of credit and the price, if such were agreed upon; 5. The consideration (in many states). Ans. Conts. 58, n.; cases: 1 Benj. Sales, 201-254; Mentz, *supra;* New Eng. Dressed Meat Co.

Statute of frauds; memorandum. Memorandum required under the Statute of Frauds, its form and contents. Baker, Sales, §§ 366-396 (excellent *resume*); Chit. Conts. 1 Add. Conts. 213, Benj. Sales. It must show necessary elements. Ellis, 7 Colo. App. 350, 1 Beach, Conts. 502-583, 2 Page 685-705, 1 Mech. Sales, 422-474. Hall: 1904, 137 N. C. 183, 107 Am. St. 477-479. How agent may sign, Worrall: 390.

Guaranty; signature. A consideration must be expressed. Wain does not extend to the 17th section of the Statute of Frauds, but only to the 4th. Ans. Conts. 57. See FRAUDS AND PERJURIES; § 4, Statute of Frauds; Wain; Lakeman, *sub,* Clark v. Des Moines; Peter: 440.

In 1856, by 19, 20 Vict., ch. 3, it was provided a consideration need not be expressed, and this has been enacted in many states. 2 Rand. Com. Paper, 870; Holmes, 7 C. B. (N. S.) 361 (97 E. C. L. R.), 12 Rul. Cas. 464, n.

Subsequent guaranty depends upon a new consideration. Jain, 3 Colo. Ap. 90.

Acceptance as an element. Tarling: 404. Sale of land; memorandum required. 1 Warv. Vend. 94-115.

Description of land may be aided orally. Kennedy, 33 S. C. 367, 26 Am. St. 676. See Goss: 55.

Lands must be described. Alabama, 121 Ala. 172, 77 Am. St. 46, n.. Barker, 125 N. C. 596, 74 Am. St. 658, n.; Sherman: 405.

Vendor must be described. Ide, 10 Mont. 5, 24 Am. St. 17, n.

Contracts by telegram. Baker, Sales, 452-463, 1 Warv. Vend. 16; Adams: 326-330.

Change of party guaranteed; change of partner. Expressio unius, etc.; Boston: 320. This releases guarantor as to future liability. Barclay v. Lucas (1784), 1 Term. Rep. 291-294, n., 3 Douglas, 321; Backhouse, 6 B. & S. 507 (118 E. C. L. R.), 12 Rul. Cas. 475, ext. n., 1 R. R. 202, n., 12 Rul. Cas. 470, n.; *Non hæc in fœdera veni;* Rees: 334.

It must be perfect and omit no essential link. Mentz, *supra.* Such link cannot be proved orally. Goss; Browne, Statute of Frauds, 371-436, 415.

Objects and purposes of the statute. Bird, 66 Me. 337, 22 Am. Rep. 571, Huff. & W. Conts. 92. *Guarantee.* 12 Rul. Cas. 464-482, n. *Contracts not to be performed in a year.* Peter: 440.

Promise to answer for the debt, default or miscarriage of another. Birkmyr. See FRAUDS AND PERJURIES.

336. EASTWOOD v. KENYON (1840), 11 Adol. & El. 438 (11 E. C. L. R.), 3 P. & D. 276, Birkmyr, 1 Smith, L. C., 11th ed., 6 Rul. Cas. 1-43, n.; 1 Langd. Conts. 343, Finch, Cas. 303, 1 Beach, 507, Keener, Sel. Cas. Conts. 427, Ans., Pars., Chit., Bish. '64, 89, 1264, Beach, Laws. 101, Smith, Whart., Ham. page 320, Hughes, Clark, Sto., 1 Add. Conts. 210, Mews' E. C. L., 2 Kent, 466, Mech. Ag. 600, Danl. Nego. Insts., Pars. N. & B. 79, 1 Brandt, Sur. 91, 39 Am. St. 735, 9 Cyc. 359.

Eastwood stated: Statute of Frduds. Promise to answer for the debt, default or miscarriage of another. A consideration is necessary to sustain a promise. Not only must the promise be in writing, but there must be a consideration also. *Rann; Cumber:* 311, 312. And it must be expressed. *Wain; Birkmyr;* Shadwell v. Id. (1868), 9 C. B. (N. S.) 159, 6 Rul. Cas. 1-43, n., Mews' E. C. L.

Moral obligation is no consideration. Sub, Lee; 2 Kent, 466, 2 Beach, Conts. 153; *Beaumont:* 367.

Contract with a third person is valid. Wood, 15 R. I. 518, Huff. & W., Conts. 430; Hendrick: 319.

337. BALDEY v. PARKER (1824), 2 Barn. & Cress. 37 (9 E. C. L. R.) 3 D. & R. 520, Adams, Cas. Sales, 19, Williston, Sales, 759, Mech. Sales, 37 Am. Rep. 18, Benj. Sales, Baker, Sales, 1 Chit., Conts., Pars., Bish., Beach, Laws, 87, Sto., Add., Ham. 299, Hughes' Conts., Page, Browne, Stat. Fraud, 2 Kent, 502, Mews' E. C. L.

Baldey stated: A purchaser selected the articles he sought to purchase of the vendee. The pieces were agreed upon; the purchaser marked some of them with a pencil, saw others marked and helped to cut off others. The bill and goods were sent to him, but he refused to accept. *Held,* that he was not bound. A purchaser wrote his name on a piece of linen. *Held,* acceptance of that piece, but not as to other pieces not marked or produced. Hodgson, 1 Camp. 233: stated, 37 Am. Rep. 17.

Delivery and acceptance necessary under Statute of Frauds. Mahan v. U. S. (1872), 16 Wall. 143, 21 L. ed. 307, n. See Tarling, 404.

Acceptance of goods under Statute of Frauds; what is. Shindler, Tarling; King, 35 Ark. 190, 37 Am. Rep. 11-22, n.

Statute of Frauds. Contract for sale of a number of trifling articles, amounting in the aggregate to the value of £10, must be in writing. Tisdale v. Harris (1858), 20 Pick. 9, Cummings, Cas. Priv. Corp. 604, 3 Pars. Conts. 54, Chit., Ans., Bisb., 2 Kent, 511, 55 N. J. L. 168, Huff. & Wood, Am. Cas. Conts. 132. See Tarling: 404: cases.

Acceptance and receipt. 1 Benj. Sales, 139-187.

Leading Cases.—

338. LEE v. GRIFFIN (1861), 1 Best & S. 272 (101 E. C. L. R.), Adams, Sales, 509, Mech. Sales, *q.v.*, Williston, Sales, 23 Rul. Cas. 191, Benj. Sales, Beach, Conts., Ans. 67, Chit., Add., Laws. 86, Clark, 54, 140, Sto., Smith, 145, Whart. 12, 714, Ham., 2 Page, 682, 20 Cyc. 243, Hughes' Conts., 2 Wh. Ev. 874, 2 Kent, 504, 14 L. R. A. 231, 6 L. R. A. 791, 31 L. R. A. 508, 9 Mews' E. C. L.

Lee stated: Statute of Frauds. The sale of goods not yet in existence—as of teeth to be manufactured—is within the statute, if the price exceeds $50. Lee. But this case is now disapproved. See *Licet dispositio de interesse futuro sit inutilis*, etc.; Goddard, 115 Mass. 450, 15 Am. Rep. 112, Huff. W. Conts. 127; stated: Lee, also Tarling and Baldey; Hientz, 29 Or. 55, 54 Am. St. 777 n. Pratt, 109 Mo. 78, 32 Am. St. 656, stating Lee; Central Co., 75 Wis. 170, 17 Am. St. 186, n. (contract, whether for sale or manufacture). Remedy for non-accepting goods manufactured. Moody: Hientz, *supra*.

Distinctions between sales of personalty and agreements for work and labor. Flynn, 91 Cal. 669, 14 L. R. A. 230, n.; Central Co., 75 Wis. 170, 6 L. R. A. 788, n.,*17 Am. St. 186; Brown Co., 64 Minn. 450, 32 L. R. A. 593, n.; Forsyth, 68 Vt. 116, 32 L. R. A. 788, n.

339. BIRKMYR (or Byrkmyr, Burkmar, Buckmyr, Bourkmire, Bourkamire) v. DARNELL (or Darnall) (1705), 1 & 2 Salk. 27, 2 Ld. Raym. 1085, Mod. Cas. 248, 1 Smith, Lead. Cas. 516-562, ext. n., 8th ed., 11th ed. (reviewing English cases), Finch, Cas. 231, Ans. Conts., Chit., Beach, Add., Smith, 106, Sto. 1114, 1437 Laws. 71, Clark, 96, Ham. 285, 287, Hughes' Conts., Throop, Verb. Agreem., *q.v.*, Brant & Fell, Sureties, 9 Rul. Cas. 340, 2 Whart. Ev. 879, Browne, Stat. Frauds.

Cited, §§ 280-288, Gr. & Rud.

Birkmyr stated: Darnell guaranteed Birkmyr that E. would surely return to B. his horse if B. would let him have it, which B. did, with the understanding that D. was responsible for E.'s safely returning the horse. Upon the faith of this the horse was loaned, and E. did not return it. B. sued D, as surety. *Held*, that under the fourth section of the Statute of Frauds (29 Charles II., cap. 3), Birkmyr could not recover, because the collateral undertaking of D. was not in writing. Birkmyr; Kilbride, 113 Cal. 432, 54 Am. St. 361, n.

In collateral undertakings there must not only be a consideration, but a writing expressing the contract as well. Birkmyr; Packer, 35 Conn. 343, 95 Am. Dec. 246-263, ext. n. (collateral and original undertakings—what cases come within the statute); Bray, 80 Wis. 16, 27 Am. St. 17-20, n.; Wolverton v. Davis (1888), 85 Va. 64, 17 Am. St. 56, n. Promise by a stranger to a debt to indemnify a surety is *prima facie* within the Statute of Frauds, because it is in effect a promise to answer for the default of the principal debtor. Stewart, 71 Mich. 201, 15 Am. St. 252, n.; Smith, 64 Conn. 264, 42 Am. St. 181-194, ext. n. (benefit to promisor an element); M'Kenzie, 9 Wash. 442, 43 Am. St. 844, n. (*Id.*); Dillaby, 60 Conn. 71, 13 L. R. A. 643, n.; Tighe, 116 N. Y. 263, 5 L. R. A. 617, n.; Nading, 121 Ind. 465, 6 L. R. A. 686, n.

Leading Cases.—339. Birkmyr.

Torts. The statute covers torts, as well as every form of action for which one may become liable. Browne, Stat. Fraud, 155; Kirkham, 2 Barn. & Ald. 613; stated, Browne, Stat. 190.

Statute of frauds; guaranty; novation. Promise to answer for the "debt, default or miscarriage of another." *Eastwood; Lakeman; Tatlock* (novation). Statute of Frauds does not apply to original debt of debtor, but to collateral undertakings, 2 Rand. Com. Paper, 871; 2 Danl. 776; Sto. Notes, 457, 470, Chit. Notes & Bills, 283, 363; 1 Edwards, N., 319, 321, 328. Nor where promisor gets no benefit. Joseph, 39 Neb. 259, 42 Am. St. 571, n.

Generally. 1 Brandt, Sur., §§ 51-91; 3 Add. Conts. 1111-1144. 2 Page, 610-639.

Guaranty. 1 Chit. Conts. 738-785.

Persons under disability; liability of guarantor for. Brown, 88 Tex. 265, 33 L. R. A. 359.

Promise to surety to induce him to indemnify.

May, 61 Miss. 125, 48 Am. Rep. 80, Huff. & W. Conts. 113.

Novation. 2 Bouv. Dic. 520-523, And. Dic. See Tatlock v. Harris (1789), 3 T. R. (D. & E.) 174, 180; Heaton, 7 N. H. 397, 28 Am. Dec. 353, Huff. & W. Conts. 442, Pars., 2 Chit. 1371-1381, Ans. 220, Bish. Add. 372-375, 1 Beach, 786, Whart., Sto. Conts., Throop, Verbal Agreements, 361, 2 Gr. Ev. 518, 2 Kent, 555, 3 *id.* 78, Bro. Max. 745, 1 Danl. Nego. Insts. 23, 745, 1 Pars. N. & B. 336, 2 *id.* 5, 51, 1 Chit. Pl. 18, 306, 1 Mews' E. C. L. 828 (Assignment), 8 *id.* 1473, 1 Jac. Fish. Dig. 1208, 3 *id.* 3902; Griggs, 136 N. Y. 152, 32 Am. St. 704, n., 18 L. R. A. 120; Sterling, 72 Wis. 36, 7 Am. St. 818; Cutting Co., 86 Cal. 574, 10 L. R. A. 369, n.; Pope, 121 Ind. 317, 6 L. R. A. 688, n.; Spycher, 74 Wis. 456, 5 L. R. A. 414, n.

Statute of frauds; novation; contracts not within. If a debtor, a creditor and a third person all agree that the latter shall be the creditor, this is a novation. *Eastwood;* Bish. Conts. 1264; McKinney, 14 Ill. 33; Huff. & W. Conts. 443; Tweedale, 116 Wis. 517, 96 Am. St. 1003.

Commercial paper; oral promise to accept is sufficient. Walker v. Lide (1845), 1 Rich. Law (N. C.), 249, 44 Am. Dec. 252, n., 2 Rand. Com. Paper, 604, 1 Pars. N. 285, 1 Pars. Conts. 291; Wells, 6 Cush. 6, 52 Am. Dec. 750, n.; Moses: 140 U. S. 298, Bish. Conts. 157; Birkmyr.

A promise to accept to give credit with a third person is within the Statute of Frauds. Allen, 26 Or. 264, 26 L. R. A. 620-623, n.

340. PETER v. COMPTON (1694), Skinner, 353, 1 Smith, Lead. Cas. (all editions, 614-633), ext. n. in 8th ed., 1 *id.* 316-322, 11th ed. (reviewing English cases), 5 Rul. Cas. 297-325, ext. n., Browne, Stat. Frauds, 290, *q. v.*, 2 Kent, 510, Throop, Verbal Agreements, 694, 17 Rul. Cas. 184, Ans. Conts., Pars., Chit., Beach, Ham. 294, Hughes, Smith, 134, Laws. 74, Clark, 109, Sto. Conts. 1443, 2

Leading Cases.—340. Peter.

Page, 669-676, 20 Cyc. 198-209; cited, § 288, Gr. & Rud.

Peter v. Compton stated: C., for one guinea paid him, promised to give P. 1,000 guineas on his wedding day. Two years later P. married and demanded performance, which C. declined upon the ground that the fourth section of the Statute of Frauds provided that "an agreement that is not to be performed within the space of one year from the making thereof" must be in writing. Upon this issue was joined. *Held,* that the statute only applies to agreements which are in their terms incapable of performance within the year—that P. might have married instantly, and therefore C. was liable.

1 Add. Conts. 212; Doyle, 97 Mass. 208, 93 Am. Dec. 80-90, n., Chit. Conts. 99-102; Brown, 69 Conn. 596, 13 L. R. A. 646, n.; Woodridge, 42 Fed. 311, 9 L. R. A. 129, n.; Seddon, 85 Va. 928, 3 L. R. A. 337, n., 13 Va. L. J. 284; Lowman, 124 Ind. 416, 7 L. R. A. 784, n. (must be executory on both sides); Arkansas R. R., 54 Ark. 199, 11 L. R. A.: 621, n.; Thomas, 86 Va. 5 L. R. A. 529, n.; Peters, 19 Pick. 364, 31 Am. Dec. 142, Huff. & W. Conts. 120; *Bracegirdle v. Heald* (1818), 1 Barn. & Ald. 722, 19 R. R. 142, 17 Rul. Cas. 177-186, n.; 20 Cyc. 208.

Statute of frauds. Contracts not to be performed in one year, and incapable of such, must be in writing if executory and relating to lands. *Young v. Drake* (1851), 1 Seld. 463, 55 Am. Dec. 356-360, n. (leases may begin *in futuro*), 17 Am. St. 753, Bish. Conts. 1302, Dev. Deeds, Whart. Ev. See Whiting, 52 Mich. 462, 50 Am. Rep. 265; 1 Wash. R. P. 614; Jellett, 43 Minn. 166, 7 L. R. A. 671, n.; Sears, 3 Colo. 287. Any excess is within the statute. Chase: 126; Wis. 75, 110, Am. St. 296.

That a slight consideration will sustain a heavy obligation is well illustrated in *Peter;* Bainbridge: 332.

Contract to employ when within the statute. Sax, 125 Mich. 252, 84 Am. St. 572.

341. LESTER v. FOXCROFT (Foxcroft v. Lester, or Lyster) (1701), 1 Colles 108, stated, 2 Vern. 436, 23 Eng. Rep. 892, 1 Lead. Eq. Cas. (W. & T.) 1027-1063, ext. n., 3 L. R. A. N. S. 791, Beach, Conts., Chit., Sto. Conts., Bigl. Fraud, 2 Sto. Eq. Pl. 761, 3 Pom. Eq. 1409, 1 Dev. Deeds, 139, 20 L. R. A. 38, Browne, Stat. Frauds 442, Mews' E. C. L., Hughes' Conts. *Cited,* p. 39; §§ 107, 127, 147, 150, 180, 223, 230, 289, 290, 326, 328, 329, 331, Hughes' Proc.; §§ 38, 70, 124, 200, 287, 288, 297*a*, 308, Gr. & Rud.

Lester stated: L. orally agreed with F. for a tenancy, and under this took possession of the premises, and continued under it notoriously and exclusively (Williamson v. Brown), and pulled down old and built new and expensive tenements. After all this F. sought to defraud L. by taking advantage of the Statute of Frauds, which requires leases for more than three years (or one year) to be in writing. L. sought

Leading Cases.—341. Lester.

and obtained specific performance. His case is an equitable exception to the Statute of Frauds, which is never applied to effectuate a fraud. 1 Beach. Eq. 84: cases.

Possession (Williamson v. Brown) and *part performance,* are grounds for relief. Nunn, L. R. 1 Ch. 35-41, 15 Rul. Cas. 368: cases.

Wallace, 18 Or. 502, 17 Am. St. 749-757, ext. n.: stated, 20 L. R. A. 37, n. (oral leases for more than a year—specific performance); Weed, 88 Ga. 686, 20 L. R. A. 33-40, n.; Frame, 32 W. Va. 463, 5 L. R. A. 323 (equity jurisdiction to enforce oral contracts); 1 Beach, Conts. 690-701; Wickson, 128 Cal. 156, 79 Am. St. 36; *Young v. Dake.*

Possession of real estate taken and held exclusively, notoriously and unequivocally under a contract, oral or written, a notice of the occupant's right. In such case a writing and registration—recording of it—are not indispensable. Fair; Le Neve: 396; *Bell v. Twilight;* Bisph. Eq. 385, 1 Dev. Deeds, 146, 2 Warv. Vend. 764-777.

Possession taken and expenditures made under a contract, take cases out of the Statute of Frauds. In such cases, oral leases may be valid for a greater period than that provided for in the Statute of Frauds. Cases of this kind are equitable exceptions to the statute. 2 Page Conts. 717-728. Wack, 2 Whart. 387, 30 Am. Dec. 269, 1 Bisph. Eq. 385, 17 Am. St. 757; Swash, 14 Wash. 426, 32 L. R. A. 796. Here acts speak louder than words. Ann Berta, 42 Tex. 18. Roberts, —Or.— 3 L. R. A. N. S. 790-817, ext. n.

Statute of frauds; contracts relating to real estate; equitable exceptions to the Statute of Frauds; part performance; contracts proved by "act and operation of law." *Res ipsa loquitur; Probatis extremis præsumuntur media.* Lyon; 1 Dev. Deeds, 150; Riggles, 154 U. S. 244, 38 L. ed. 976, n.; 1 Chit. Conts. 422; Woollam: 53.

Statutes are construed to defeat fraud not to advance and protect it. The construction of the statute of frauds in Lester well illustrates this rule. Riggs; *Lex non exacte,* etc.; *Ex dolo malo non oritur actio; Ubi jus ibi remedium;* Nelson, 96 Ala. 515, 38 Am. St. 116, n.; Grant, 63 Conn. 530, 38 Am. St. 379, n.

Facts, not conclusions must be pleaded. Green.

Pleading and proving equitable exceptions to the statute of frauds is surpassingly technical. It is more so than the requirements for perjury or conspiracy, or of res adjudicata. Criminal procedure is not more certain nor more technical than civil. Sprague, —Or.—, 4 L. R. A. N. S. 410-416, ext. n. (proof required).

There may be a specific performance of an oral agreement respecting real estate in contradiction of the Statute of Frauds. Bigl. Fraud, 385-394; Fair; 1 Dev. Deeds. 133-173.

Leading Cases.—341. Lester.

Possession and part payment sufficient. Frame v. Dawson (1807), 14 Ves. (Eng.) 386, 9 R. R. 304, 33 Eng. Rep. 569, Mews' E. C. L. Bigl. Fr. and 388, Bisph. Eq. 385, 2 Sto. Eq. 760-763, 1 Dev. Deeds, 141, 169; *Wills v. Stradling* (1797), 3 Vesey, Jr. 378, 4 R. R. 26, 3 Eng. Rep. 1063; stated, 20 L. R. A. 38, Browne, Stat. Frauds, 476, 479, Mews' E. C. L. Let the purchaser beware (*Caveat emptor*), Bro. Max. 768.

Cited, §§ 58, 147, 149, 195, 237, 303, Gr. & Rud.

342. THOMSON v. DAVENPORT (1829), 9 Barn. & Cress. 78 (17 E. C. L. R.), 4 M. & Ry. 110, 2 Smith Lead. Cas. 398, 8th ed., 11th ed.; Chit. Conts., 1 Add. 56, 57, 80, Sto. 253, 311, Smith 442, 443, 447, 457, Whart. Laws., Clark, Pars., Ans. (rule stated), Hughes' Conts., Jones Construc. 94, 175, 1 Wh. Ev. 75, 2 *id.* 951, 1 Kent, 631, 4 *id.* 142, 15 L. R. A. 65, Sto. Ag. 267-269, ext. n., 3 Suth. Dam. 796, 2 Pars. N. & B. 179, Mech. Ag., Mech. Cases Ag., Whart. Ag., 1 Chit. Pl. 41, 45, Bro. Max. 822, 1 Gr. Ev. 196, Mews' E. C. L., Mahon Cy.; 14 C. B. (5 J. Scott) 390 (78 E. C. L. R.) (states Thomson, Addison and Paterson cases). Cited, §§ 230, 306, 307, 313, Hughes' Proc.

Thomson stated: Davenport sued Thomson to recover goods sold and delivered to T. at his instance and request, through his agent, one McKune, who bought the goods, not, however, pretending to be buyer for himself, as he informed D. he was buying for customers in Scotland, but he did not mention their names, and D. did not ask for them. Afterwards M., the agent, failed, and this was brought. T. insisted that the credit was exclusively given to M., the agent, and that therefore he was not liable. *Held,* D. could recover from T., the principle being that where an agent does not disclose the name of his principal, the creditor may afterwards elect to hold the real principal.

1. Where one deals with an agent, knowing his principal, and then gives exclusive credit to the agent, such election is final and conclusive; afterward the principal cannot be sued.

2. When agent appears to be principal, but afterwards it is discovered he is only an agent, then a person dealing with him may sue either the agent or his principal, as he may elect. In such cases an election should be made within a reasonable time.

3. Agent dealing as if principal, binds himself; if as agent, but not disclosing his principal, then the principal, when discovered, may be sued. Agent disclosing his principal is not bound unless credit was exclusively to him.

4. Agent signing contract as principal is bound as such. Oral evidence is inadmissible to alter or vary the writing—the agent is estopped from disputing it; but the creditor is given a larger latitude, for in simple contracts he may show who the real principal is, unless the contract is commercial paper. As to this a strict rule obtains.

Disclosed and undisclosed principals; parties.

Leading Cases.—342. Thomson.

Pom. Rem. 141, 175, 177, 1 Chit. Conts. 8, 41-45, n., 1 Mech. Sales, 268.

Undisclosed agent liable for negligence as if disclosed. Morris, 200 Ill. 132, 93 Am. St. 180, n.

Paterson v. Gandasequi (1812), 15 East, 62, 13 R. R. 68, 2 Smith L. C. 386-397, 8th ed., 365-371, 11th ed., Mech. Cases Ag. 545, Mech. Ag., Whart., Sto., Chit. Conts., Pars., Bish., Add., Hughes, 1 Rand. Com. Pap. 1079, 1085, 2 Kent, 633, Mews' E. C. L. § 324, Hughes' Proc.

Thomson, Paterson and *Addison* are three widely cited cases in Contract and Agency, and in reference to who are proper parties in suits on contracts of agents. The principle involved is of much consequence throughout the law. It courses through many strands; it shows that rules of contract and of procedure are interactions.

343. ADDISON v. GANDASEQUI (1812), 4 Taunt. 573, 13 R. R. 689, 1 Smith, 392, Pars. Conts., Chit. Conts., Mech. Ag., Mech. Cas. Ag., Sto., Whart., Huff., Tiffany, Ag., Mews' E. C. L.; Cream City, 84 Wis. 53, 36 Am. St. 895, 21 L. R. A. (oral evidence, when admissible to show principal); Ferguson, 91 Cal. 63, 14 L. R. A. 65, citing *Thomson v. Davenport.* See *Qui sentit*, etc.; Hughes' Conts.

Cited, §§ 306, 307, 313, 324, Hughes' Proc.

344. TAINTOR v. PRENDERGAST (1842), 3 Hill, 72, 38 Am. Dec. 618, 1 Am. L. C. 755, 1 Pars. Conts. 66, 101, 1 Chit. 302-315, Smith, 447, Laws. 190, 192, Clark, Sto., Hughes' Conts., Mech. Ag., Sto., Whart., Huffc., 1 Rand. Com. Pap. 147, 2 Whart. Ev. 950, 2 Kent, 631, 632.

Undisclosed principal; right of, under contract made in agent's name. Ford, 21 How. 287, 16 L. ed. 36, n.; Powell, 109 Ala. 95, 55 Am. St. 915-923, n.

Deed must be executed in principal's name, or he is not bound. *Elwell v. Shaw;* Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Mech. Ag., Huffc.; Sanger, 91 Tex. 472, 66 Am. St. 913, n.; McDonough, 1 Harris & J. (Md.) 156, 2 Am. Dec. 510-518, ext. n. (when instrument will be inspected).

Commercial paper; same rule as in deeds applies. Oral evidence is inadmissible to alter. Sturdivant: 410; Mech. Ag. 696; 1 Rand. Com. Paper, 147, 1 Danl. 287; Brown: 54.

345. LIVINGSTON v. ROOSEVELT (1809), 4 Johns. 251, 4 Am. Dec. 273-283, n., 1 Am. Lead. Cas. 507-562, ext. n., 1 Pars. Conts., Chit., Sto. 309, Rand. Com. Paper, Danl., Pars. N. & B., Lind. Part., Pars. Part., Sto. Part., 3 Kent, 44. Cited, §§ 306, 312, Hughes' Proc.; § 303, Gr. & Rud.

Livingston stated: Partnership; "scope"; "range of business." C. C. R. & Co. dealt in sugar under a sign "Sugar House"; C. I. C. was a member of the firm, and indorsed a note given for twenty pipes of brandy in the firm name, all of which the indorsee, L., knew; still he sued upon the note, and the company pleaded *non assumpsit,* and succeeded upon it. Baxter, 90 Iowa, 217, 48 Am. St. 432-442, n.

Partners are agents for each other, and

Leading Cases.—345. Livingston.

within the "range of the agency," the "scope of the business," may bind each other as an agent may a principal. Livingston. Qui sentit commodum, etc.

How far partners are liable for each other's acts. Note 12, L. ed. (U. S.) 81; Kerper, 48 Ohio, 613, 15 L. R. A. 656-661, n. (after dissolution). See also Waugh; 69 Am. St. 403-436, ext. n. Surviving part ners, powers of. Moore, 17 Wall, 417, 21 L. ed. 642, n.

Non-trading partnership; bill or note of, not binding on members not signing. Lee, 45 Kan. 8, 11 L. R. A. 238, n. (*Non hæc in fœdera veni*).

Sharing in profits constitutes one a partner to third persons. Waugh, n., Smith, Lead. Cas.; M'Cullough, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271, 1 Am. Lead. Cas. 569-591, n., 1 Pars. Conts. 221, 3 Kent, 65.

Partnership. Joint creditors in equity can only look to the surplus of the separate estate after payment of the separate debts. Separate creditors in equity can only seek indemnity from the surplus of the joint fund after the satisfaction of the joint creditors. Livingston; Smith (1819), 16 Johns. 102, 1 Am. Lead. Cas. 563-591.

The government's prior lien is subject to this equity and attaches accordingly. U. S. v. Hack (1834), 8 Pet. 271, 8 L. ed. 941, n. *Quando jus domini,* etc.

One partner cannot pay his individual debt with firm assets. Rogers v. Batchelor (1838), 12 Pet. 221, 1 Am. L. C. 358, 2 Bates, Part., Rand. Com. Paper, Danl., Pars. N., Pars. Conts., Chit. Bigl. Fraud, 375-378, 3 Kent, 44, 85 Ala. 199, 8 Am. St. 38.

Partners may recover funds misappropriated. Davies, 124 Ill. 474, 7 Am. St. 373-380, ext. n. And have them applied to firm debts. Farwell, 151 Ill. 239, 42 Am. St. 237, n.

Execution sales of partnership property. Williams, 115 Ind. 45, 7 Am. St. 403, n. *Levy on partnership property for the debt of a partner.* Skavdale, 21 Wash. 10, 46 L. R. A. 481-501, ext. n. *Partnership creditors, rights and remedies of; procedure.* Smith, 87 Iowa, 93, 43 Am. St. 359-380, n.

Partner alone may make an assignment for benefit of creditors. Anderson, 1 Brock. 456, 1 Am. L. C. 530-610, ext. n.; Lind. Part., Pars. Part., Sto. Part., Dev. Deeds, 110, Pars. Conts., Chit. Equitable estoppel—application to partners. Ewart, Estop. 513-529.

346. BROWN v. BUTCHERS' AND DROVERS' BANK (1844), 6 Hill, 443, Redf. N. & B. 110, 41 Am. Dec. 755, Bish. Conts., Pars., Clark, 125, Sto. 1176, Hughes' Conts., 1 Page 81, 3 Kent, 78, 4 *id.* 514, Rand. Com. Pap., Danl., 1 Pars. N. 22, 23, Huff. Nego. Insts., 1 Mech. Sales, 451. Cited, § 312, Gr. & Rud.

Brown stated: Right to adopt any name; form of endorsement. The following figures, viz. "1, 2, 8," in connection with evidence tending to show that person who placed them there meant thereby to bind himself as an indorser, constitutes a valid indorsement, though it also appeared that he could write. R. v. Martin, *sub,* FORGERY. *One may adopt any name he pleases, at any time.* Bro. Max. 196, n., Smith, Conts. 95; see NAMES.

Writing may be in pencil. Bish. Conts. 341, 1 Rand. Com. Paper, 60, Byles, B. 79, Chit. B. 147, 1 Danl. § 83, 1 Edwards, B. 169, 1 Pars. N. 21, Sto. N., § 11; *Geary v. Physic* (1826), 6 Barn. & Cres. 234 (11 E. C. L. R.), 7 Dowl. & Ry. 653 (16 E. C. L. R.), 29 R. R. 225, Mews' E. C. L., Huff. Nego. Insts., 1 Benj. Sales, 258; 4 Kent, 514; Closson, 4 Vt. 11, 23 Am. Dec. 245; Reed, 14 Tex. 329, 65 Am. Dec. 127; cited, Bish. Conts. 341, 1 Dev. Deeds, 136.

Pencil writing sufficient in deed of settlement. Brown; McDowel, 27 S. C. 347, 1 Strobh. Eq. (S. C.) 347, 1 Rand. Com. Paper, 60; note 7 Am. Dec. 289.

Contract. Merritt, 12 Johns. 102, 7 Am. Dec. 286, 2 Schoul. Pers. Prop. 539; Jeffery, 1 Stark. 13; Mews' E. C. L.; Draper: 2 Speers (S. C.) 2 (under the Statute of Frauds), Bish. Conts. 156, 1 Wh. Ev. 516, Wh. Crim. Ev. 520; Clason, 14 Johns. 484, Huff. & W. Conts. 102, 109.

Wills. Green v. Skipworth (1809), 1 Phillim. 53; Dickenson, 2 Phillim. 173; Meyers, 84 Pa. 510, 24 Am. Rep. 227. *Codicil.* Rymes, 1 Phillim. 22.

Pencil writing not sufficient for records. Meserve, 4 Foster (N. H.), 295; Fail, 50 Ala. 342. Pleadings; these should be in ink. Fail; 1 Bish. Crim. Proced. 337, 8 Encyc. Pl. & Pr. 21 (but a pencil is recognized). Recording map with pencil is insufficient. Caldwell, 30 Cal. 539, 89 Am. Dec. 131. Slate: writing on, sufficient. 1 Wh. Ev. 616, n. Writing sufficient if on anything, in any way, if only expressive, as tallies on wood. 1 Best, Ev. 215; Wh. Crim. Ev. 520; 7 Am. Dec. 289, n.

Written contracts not superior to oral ones, except for records, deeds, commercial paper and contracts required by statute to be in writing. 1 Add. Conts. 7; Bish. Conts. 54; 3 Bl. Com. 158. See FRAUDS AND PERJURIES; STIPULATIONS. Cited, § 227, Hughes' Proc.

A deed in one's own handwriting needs no other or different signature. Newton, 66 Tex. 142. See § 32, Hughes' Conts. What sufficient under statute of frauds. Schneider v. Norris, Smith, Conts. 93, 2 Page Conts. 688-695.

Names; signature. One may use or adopt any name he pleases. "1, 2, 8," in pencil, was adopted as a name, and is a sufficient signature and indorsement. Brown, etc.; *Expressio eorum,* etc.; *Certum est quod,* etc.; Cleveland Bank, 97 Tenn. 458, 39 L. R. A. 423, n. One may adopt any name he pleases, if he does not personate another; personating another is forgery. R. v. Martin, *sub,* FORGERY. But not where credit was given exclusively to the person adopting the new name. R. v. Martin; 1 Danl. Nego. Insts., § 141. Signatures of a party. 1 Benj. Sales, 255-

Leading Cases.—346. Brown v. B. 264: cases. Person fraudulently using fictitious name is guilty of forgery. 1 Danl. Nego. Insts., § 107. Bills and notes to which there are fictitious, or no existing parties, are sometimes void, except in the hands of innocent holders. 1 Danl. Nego. Insts., §§ 136, 141; Armstrong, 46 Ohio, 512, 6 L. R. A. 625, n. *Presumption of identity of person from identity of name.* Rupert, 35 Neb. 587, 17 L. R. A. 824, ext. n. Acquisition and use by an individual of a name. Lafin & Rand, 146 Pa. 434, 14 L. R. A. 690, n.

In judicial proceedings names must be set out with certainty. Wiebold: 98. See *Idem sonans.*

Signature. Agent for principal may write latter's name for him in his presence and at his direction, and such signing is in law the principal's. Hanley: 204; Mech. Ag. 96, Bish. Conts. 345; Lewis, 98 Ala. 479, 22 L. R. A. 297, n.; Hall: 137 N. C. 183, 107 Am. St. 404-479 (liberal rule).

Signatures by mark; what sufficient. Zacharie, 12 Pet. 151, 9 L. ed. 1035, n., 1 Gr. Ev. 272, n.; Guilfoyle, 96 Cal. 598; 22 L. R. A. 297, n. Mark must be proved to be genuine. Note, 9 L. ed. (U. S.) 1036. Attorney's signature, if printed or lithographed, sufficient. Herrick, 37 Minn. 250, 5 Am. St. 841. Statute requiring signature to process is satisfied with stencil. Loughren, 125 Ia. 578, 106 Am. St. 319.

Accepting and acting on a contract is a sufficient signing. Thieband, 143 Ind. 340, 344: cases; Moller.

Proof of signature by mark when attesting witnesses thereto are dead or cannot remember the transaction. Wienecke, 88 Md. 182, 44 L. R. A. 142-149, ext. n.

347. BROWN v. LAMPHEAR (1862), 35 Vt. 252, 2 Chit. Conts., Whart. Conts. 206, 207, Kerr on Fraud and Mistake, 2 Pom. Eq., 37 Minn. 32, 3 Am. St. 317, 3 Wash. R. P. 382, 1 Perry, Trusts, 2 Beach, Eq., Hughes, Conts., 1 Page Conts. *Cited,* §§ 81, 306, Gr. & Rud.

Brown stated: Mutual mistake ground for rescission. B. conveyed to L. a parcel of land upon which was a spring unknown to L., and particularly valuable to B. for use of his house upon an adjacent parcel. B. inadvertently made no reservation for right to use the water, which was of more value to him than the purchase price paid by L. Rights of third persons had not intervened and the parties could be placed in *statu quo. Held,* B. was entitled either to a rescission or to use the water, at the election of L.

A contract founded in a mutual mistake of the facts constituting the very basis or essence of it will avoid it. Brown; Boston: 320; Newton, 66 N. H. 136, 49 Am. St. 593, 9 L. R. A. 50; Wheadon; Cooke: 321; Benson, 127 Cal. 532, 78 Am. St. 81; Laws. Conts. 212, 214.

Bilateral error may be corrected. 1 Whart. Conts. 207. Concurrent error ground for

Leading Cases.—347. Brown v. L. rectification of mistake. Whart. Conts. 206.

Negligence does not excuse. Whart. Conts. 196; Williams v. Stoll; Young v. Grote; Ewart, Estoppel, 98-121. *A marriage under mistake as to person is voidable.* Whart. Conts. 265. *Rescission of agreements.* Brown, Lansdowne.

Reformation. *Hunt v. Rousmanier;* 2 Beach. Eq. 538-555; Adams, Eq. 402-452; Bisph. Eq.

348. KYLE v. KAVANAGH (1869), 103 Mass. 356, 4 Am. Rep. 560-563, Huff. & W., Conts. 246, Whart. Laws. 214, Clark 298, Sto. 814, 995, Ham. 97, 1 Pars. 545, 2 Chit. 1024, 1033, Page, 74, Hughes' Conts., 1 Dev. Deeds 27, Mech. Sales, Benj. Sales, 606, n.

Kyle stated: Mistake avoids a contract. See (*Hunt v. Rousmanier*). Kyle contracted for a good title to certain lots on Prospect street in Waltham. There were two Prospect streets in Waltham, and the land he intended to bargain for was not the land his proposed vendor owned. *Held,* there was no sale. *Ignorantia facti,* etc. *Mistake as to subject-matter avoids a contract.* There must be a union of the contracting minds to the same thing in the same sense. If one is talking about one thing and the other something else, there is no contract. Kyle; *Boston:* 320. Genuine consent must be given, unmixed with fraud or mistake. The formula of a contract is not sufficient. A transaction of mere frolic or banter is insufficient. Contracts are about things, realities, not fiction, mistakes, or nonsense: *Fabula non judicium.* Ans. Conts. 3, n. *There must be reality of consent.* Ans. Conts. 121-171, Laws. Cont. 212. Bro. Max. 690, n.

And of consideration. *White:* 317, *Beaumont:* 367.

Mistake will avoid a contract. Hunt v. Rousmanier: cases; Brown; Ans. Conts. 121-135, 1 Benj. Sales, 606-635; Zaleski: 306; 2 Page Conts. 55-86, 1237-1250.

Mistake as to existence or identity of a subject-matter avoids a contract but not as to quality or value. Hecht, 145 Mass. 335, 9 Am. St. 708, n.; Zaleski. See Wheadon; Purcell, 10 Gratt. 246. Contract for a good title is satisfied by a quitclaim deed, attended with exclusive possession. Kyle. Personal injuries; compromise of, not set aside because condition of injured person was not known. Kowalke, 103 Wis. 472 (citing *Ignorantia facti,* etc.).

349. WHEADON v. OLDS (1838), 20 Wend. (N. Y.) 174, Keener, Quasi Conts. 30, 2 Chit. 929, 930, Whart. 181, 753, Laws. 52, Clark, Sto. 529, 541, Ham. 100, 102, Hughes' Conts., 2 Pom. Eq. 839, Mech. Sales. Cited, § 154, Hughes' Proc.

Wheadon stated: Mutual mistake vitiates sale. W. bought of O. oats in bulk to be measured by half-bushels, and upon these kept tallies to 500, then they guessed the remainder and W. took the whole lot at 1900 bushels, "hit or miss." Both erroneously counted the tallies as 500 bush-

Leading Cases.—349. Wheadon.

els instead of half-bushels, and upon this error estimates were made. There were only 1488 bushels, instead of 1900 as estimated and paid for. W. sued to recover the price of the 412 bushels which were lacking. *Held*, he could recover; that the mistake was mutual; that there was no assent. See Brown; Hunt; *Ignorantia facti*, etc.

Money paid through a mistake of fact, in respect to which both parties were equally bound to inquire, may be recovered back. Wolf, 123 Ill. 585, 5 Am. St. 565, citing Wheadon, Keener, Quasi Conts. 26-158; Cox v. Prentice (1815), 3 M. & S. 344; cited, 8 C. B. 658, 659 (65 E. C. L. R.), 16 R. R. 288; Bro. Max. 716: cases; 9 Mews' E. C. L.; Galbraith v. Ill. Steel Co.

Mistake as to person contracted with vitiates claim of contract, although an article is delivered and consumed. Boston: 320. Mutual mistake as to price prevents title passing. Rupley, 74 Ill. 351; Ans. Conts. 123. Or as to the condition of a thing sold, as where a blooded cow was erroneously supposed to be barren, the contract may be rescinded and replevin brought. *Sherwood*, 66 Mich. 568, N. 919, 11 Am. St. 531: cited, Ans. Conts. 123; Laws. Conts. 214; Zaleski: 306.

Res adjudicata; recovery at law ends litigation. Wheadon; Mariott.

Mutual mistake is ground for correction. Murdock, 178 U. S. 139, 150. Or reformation. 2 Page Conts. 1237-1254, or damages. Butler, 12 L. R. A., 273-279, n.

Mistake in the law of contract; effect of. Thornton v. Kempster (1814), 5 Taunt. 786 (1 E. C. L. R.), 1 Marsh. 355, 15 R. R. 658, 12 Mews' E. C. L. 413; 1 Chit. Conts. 517; Gardner, 9 Allen (Mass.), 492, 85 Am. Dec. 779, 12 Allen, 39.

350. COGGS v. BERNARD (1704), 2 Ld. Raym. 909, 1 Salk. 26, 3 *id.* 11, 269, 1 Smith, Lead. Cas. 360, 471, 8th ed., ext. n., 11th ed., Gt. Opin. by Gt. Judges, 40, 1 Am. Neg. Cas. 948, Smith, Conts. 189, Whart. 320, 505, Clark, 179, Sto., Ham. 315, Laws., 1 Chit. 48, Pars. Bish., Add., Hughes' Conts., Whart. Neg., Bisph. Eq., 2 Best, Ev. 430, 1 Add. Torts, Cool., Bish., Moak, Underh. Torts, 2 Kent, 559-611, Hutch. Carr. *q. v.*, Sto. Ag., Huffc., Mews' E. C. L. See works on Bailments which cite it often: Lawson, Bailm., Van Zile, Bailm., *q. v.* It is the foundation of many pages of Schouler on Bailments. Royce, 20 R. I. 418, 39 L. R. A. 846.

Cited, §§ 5, 158, 284, Hughes' Proc.; § 396, Gr. & Rud.

Coggs stated: Bailments. B. volunteered to assist C. to raise and transport several hogsheads of brandy. B. did this so clumsily that one of them was staved, causing damage. C. sued him for negligence. *Held*, he could recover.

A gratuitous undertaking is a sufficient consideration. Coggs; Bainbridge: 332; Wilson v. Brett; 94 Tex. 287.

In *Morgan v. Cox* an infant killed a slave while volunteering to assist him drive a cow. The confidence induced by undertaking any service for another is

Leading Cases.—350. Coggs.

sufficient legal consideration to create a duty in its performance. Coggs; Rule 9, Moak, Torts; *Qui per alium facit*, etc. Trust and confidence is a sufficient consideration. This is a principle in agency. Coggs; Bainbridge: 332; 2 Pars. Conts. 101, 223.

Passenger's negligence; personal injury; measure of damages. Penn R. Co., 102 U. S. 451, 26 L. ed. 141, n.; 2 Sedgk. Dam. 859-873.

Passenger; duty of carrier to provide safe appliances for. Ingalls. *Carrier of passengers.* Hutch. Carr., Suth. Dam. 934-956, Sedgk. Dam. *Carriers by rail.* Bish. Torts, 1055-1115; Cool. Torts, 626-666. Whitney: 140.

Excuses of carriers; what are. Actus Dei, etc.; Cool. Torts, 754, 764, Hutch. Car., 2 Pars. Conts. 159, Bro. Max. 238; Blythe, 15 Colo. 333, 11 L. R. A. 615, n. (hurricane); 22 Am. St. 402; Smith v. R. R., 91 Ala. 455, 11 L. R. A. 619, 24 Am. St. 929 (floods); 2 Kent, 604. 1 Kinkead, Torts, 111-123.

Connecting lines. Bish. Torts, 1110; Vanatta, 154 Pa. 262, 35 Am. St. 823, n. (beginning of liability of each); Central R. R., 91 Ga. 282, 44 Am. St. 37, n.; Pa. R. R. v. Loftis.

Fraud of shipper in order to get lower rates. U. S. Express, 65 Minn. 540, 33 L. R. A. 600.

Duty to carry all and for all. Little Rock, 57 Ark. 112, 18 L. R. A. 527, 7 Am. R. R. & Corp. Rep. 270-337, ext. n., Bish. Torts, 1060. *Qui sentit commodum*, etc.

Express companies; sending parcels. Bish. Torts, 1184-1193, Cool. Torts, 762; Bullard, 107 Mich. 695, 33 L. R. A. 66, n. (duty to deliver). Their relations as carriers and of their employees to other common carriers. Pittsburgh R. R., 148 Ind. 196, 62 Am. St. 503-525, ext. n.

Baggage transfer companies; liability. Anniston, 107 Ala. 600, 34 L. R. A. 137, ext. n. *Mail; communication by.* Bish. Torts, 1194-1202. *Contracts of affreightment.* 3 Kent, 202, 253, 11 Rul. Cas. 355-376.

Carriers of freight; termination of liability. Columbus, 89 Ala. 612, 3 Am. R. R. & Corp. Rep. 46-64, n., 3 Suth. Dam. 910; Constable, 154 U. S. 51-102, n.; East Tenn., 91 Tenn. 699, 17 L. R. A. 691, n. Duties of express companies as common carriers. Bullard, *supra*.

Delivery to carrier is delivery to consignor. Ramsey, 55 N. J. L. 320, 22 L. R. A. 415-430, n.; Lickbarrow: 294.

To whom delivery may be made under bill of lading. Nebraska Meal Mills, 64 Ark. 169, 38 L. R. A. 358-367, ext. n.

Delivery to wrong person; carrier liable for. Sword, 89 Tenn. 126, 3 Am. R. R. & Corp. Rep. 449-454, n.; Ill. Cent., 165 Ill. 570, 36 L. R. A. 527-530: cases; Pac. Exp. Co., 160 Ill. 215, 37 L. R. A. 177, n.: cases. *Delivery; notice of arrival.* Ill. Cent. R. R., *supra*. Actions by carriers.

Leading Cases.—350. Coggs.

3 Suth. Dam. 877-897; 3 Encyc. Pl. & Pr. 870-873.

Demurrage; delays of loading and unloading. Van Etten, 134 N. Y. 143, 30 Am. St. 630-641, ext. n.; 9 Rul. Cas. 196-282: cases.

Common carriers. 2 Gr. Ev. 208-222*a*; 2 Sedgk. Dam. 840-873. Generally. Hutch. Carr., Ror. R. R., Bish. Torts, 1023-1164, 3 Suth. Dam. 877-956; *Ingalls v. Bills;* 3 Encyc. Pl. & Pr. 814-873. See following cases.

Carriers; railroads. Chit. Conts. 681-735; 2 Add. Conts. 838-1016; 3 Encyc. Pl. & Pr. 814-873.

Bailments generally. 1 Chit. Conts. 661-735, 2 Add. Conts. 784-881, 2 Kent, 559-611, citing Coggs, *q. v.*

Deposit. 9 Rul. Cas. 282-287, n.

351. WILSON v. BRETT (1843), 11 Mees. & Wels. 113, 12 L. J. Exch. 264, 63 R. R. 630, 2 Smith, Torts, 146, n., Pars. Conts. Sto., 2 Add. 839, Chit., Hughes' Conts., Mech. Ag. Huffc., Reinh., Tiffany, Ag., Cool. Torts, Whart. Neg. Shear. Neg. 16, 2 Pom. Eq. 1070, 2 Kent, 570, Mews' E. C. L., Lawson, Bailm., Story, Schouler, Van Zile, Bailm.

Bailments; gratuitous bailees. Although a gratuitous bailee is bound to slight diligence only, he must use special skill if he possesses it. A party who rides a horse at the request of the owner, for the purpose of exhibiting and offering him for sale without any benefit to himself, is bound to use such skill as he possesses; and if proved to be conversant and skilled in horses, is equally liable with a borrower for an injury done the horse. Wilson; Coggs.

352. RAILWAY CO. v. LOCKWOOD (N. Y. Cent. Ry. v. L.) (1873), 17 Wall. (U. S.) 357, 21 L. ed. 627, 2 Smith, Torts, 148, n., 3 Am. Ry. Cas. 495, Thomp. L. C. Carr. Pass. 378, 1 Am. L. T. 21, Laws, Conts., Whart. Conts. 488, Hughes' Conts.; Cau (1904), 194 U. S. 427, Hutch. Carr. 262; 215 Ill. 540, 106 Am. St. 107; Cherry, Kirby, 4 S. Dak. 105, 46 Am. St. 765-780, ext. n., 49 Am. St. 613, 2 Gr. Ev. 222*a*, Cool. Torts, Bish. Torts, Greenh. Pub. Pol. 510-512, 523 (able *resume*); Whart. Neg., Ror. R. R. & Interstate Law, 84; Busw. Pers. Inj. 116; Baltimore Ry., 176 U. S. 498 (one may contract for carrier's immunity), Schoul. Bailm., Lawson, Bailm., Van Zile, Bailm., 3 Cook, Corp. 908: cases. Cited, §§ 158, 303, 304, Hughes' Proc.; §§ 296, 304, Gr. & Rud.

Railway stated: L. had a pass over the N. Y. Cent. R. R. It was given to him, as L. was a drover—a large shipper. Indorsed upon it was this: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for loss or injury to the property of the passenger." In an accident L. was hurt. For his injury he sued, and the company defended upon the condition—the above indorsement. *Held:*

Leading Cases.—352. Lockwood.

1. A common carrier cannot lawfully make a contract for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. 2. It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. 3. These rules apply to carriers of free passengers and for hire, and with special force to the latter.

Those who accept gratuities and acts of hospitality must conform to and abide by the conditions upon which they are granted. Boering, 193 U. S. 442; *Payne,* 157 Ind. 616, 56 L. R. A.: cases. (Free passenger bound by stipulation limiting liability); see Cent. L. J. 1903 (great *resume* of cases); Osgood v. R. R.

Conditions on unsigned passenger tickets; effect of. Walker, 62 Kan. 327, 84 Am. St. 392-408, ext. n.

A man cannot barter away his life, or his freedom, or his substantial rights. § 18, Hughes' Conts.; 192 U. S. 446: cases.

Time limitations on first-class tickets invalid. 84 Am. St. 397.

Common carriers; passengers; traveling on "free pass" with conditions. Common carriers can make no conditions that will exempt them from the exercise of ordinary care. Coggs; Philadelphia R. R. v. Derby; Readhead v. R. R.; Hollister: 354.

Rintoul v. N. Y. R. R., 17 Fed. Rep. 905, 23 Am. Law Reg. 294-306, ext. n.; Merchants: 149 Ill. 66, 41 Am. St. 265, n.; Alair, 53 Minn. 160, 54 N. W. 1072, 8 Am. R. R. & Corp. Rep. 445-479, ext. n., 19 L. R. A. 764; Missouri Pac., 72 Tex. 127, 13 Am. St. 776-787, ext. n., 2 L. R. A. 75; Kansas City R. R., Rodebaugh (baggage); Abrams, 87 Wis. 485, 9 Am. R. R. & Corp. Rep. 334-364; Ashenden v. Ry., 5 Exch. Div. 190, 31 Moak, Eng. Rep. 644, 3 Mews' E. C. L. 124; Potter, 60 Fed. Rep. 625, 23 L. R. A. 746, n. (baggage; notice endorsed on ticket); Ballou, 17 R. I. 441, 14 L. R. A. 433, n. (liberal rule for carrier); Duntley, 66 N. H. 263, 49 Am. St. 610, n., 9 L. R. A. 449.

What they may contract against. 2 Kent, 608; New Jersey Co., 6 How. 344, 12 L. ed. 465, n.; Muldoon, 10 Wash. 311, 45 Am. St. 787, 9 Am. R. R. & Corp. Rep. 715-722, n. (gratuitous passenger); S. C., 7 Wash. 528, 38 Am. St. 901, 22 L. R. A. 794, n.; California Works, 113 Cal. 329, 36 L. R. A. 648-653, n.; Queen of Pacific (1900), 180 U. S. 49, Tarbell, 73 Vt. 347, 87 Am. St. 734, n.

Limitations of carrier's liability in bills of lading. Stipulations exempting carrier from liability: The contract in general. Chicago, 194 Ill. 9, 88 Am. St. 68-134, ext. n.

Baggage; loss of, from negligence. N. Y., etc., Co. v. Fraloff; 2 Kent, 601.

Gross negligence cannot be stipulated against; Salus populi suprema lex.

Humphreys, 148 U. S. 627, 37 L. ed. 587, n., 1 Suth. Dam. 6: cases; Hutch. Carr.; Cole, 19 Wend. 251, 32 Am. Dec. 470-507, ext. n.; *Nulla pactione,* etc.; *Pacta,* etc.; Bro. Max. 696, 697; 180 U.

Leading Cases.—352. Lockwood.

S. 49. *Gross negligence is viewed as fraud.* 2 Kent. 560-562; Bro. Max. 696, 697.

Express companies; limiting liability for loss to a specified amount. Ballou, 17 R. I. 441, 5 Am. R. R. & Corp. Rep. 134-142, n., 14 L. R. A. 433; Pac. Exp. Co., 46 Kans. 457, 4 Am. R. R. & Corp. Rep. 365-385, n., 12 L. R. A. 799; Baltimore Express, 66 Miss. 558, 14 Am. St. 586, n.

Telegraph companies. Western Union Tel. Co. v. Short (1890), 53 Ark. 434, 3 Am. R. R. & Corp. Rep. 564-577, 9 L. R. A. 744, 2 Kent, 611.

A common carrier cannot become a private carrier by contract. Hutch. Carr. 44.

A carrier cannot stipulate against his own negligence. Liverpool Steamship Co., 129 U. S. 397, 32 L. ed. 788; *Pactis,* etc. § 18, Hughes' Conts.

Limiting liability by contract. Little Rock, 57 Ark. 112, 18 L. R. A. 527, 7 Am. R. R. & Corp. Rep. 270-337, ext. n. (cases from all states); 1 Suth. Dam. 6: cases.

There is no presumption that a passenger assents to the terms of a complex technical ticket, unless he has notice of what they are. Hutchins: 181 N. Y. 186, 106 Am. St. 537; Cherry.

Fare; its payment; rights and duties arising from. Hutch. Carr. 567, 567*d*. *Tickets, purchasers of.* Contract by, limitations upon. Hutch. Carr. 568-801, 24 Am. St. 392-408.

Freight; horse; value fixed, and if of greater, this must be stated and a less rate paid. Such limitations are valid. Duntley, 66 N. H. 263, 9 L. R. A. 449, 3 Am. R. R. & Corp. Rep. 259-262, ext. n.

Limiting liability; generally. Gr. Pub. Pol. 509-528: cases; 3 Cook, Corp. 908. *Time for presenting claims of loss.* Queen of Pacific (1900), 180 U. S. 49.

353. INGALLS v. BILLS (1845), 9 Met. 1, 43 Am. Dec. 346, Thomp. Lead. Cas. Pass. 112, Redf. Am. Ry. Cas. 471, 9 Am. Neg. Cas. 426, 2 Pars. Conts. Sto., 1 Chit. 731, *q. v.* Hughes' Conts., 36 Am. St. 847, 2 Gr. Ev. 222, 2 Kent, 601, Busw. Pers. Inj. 113, Schoul. Bailm. Cool. Torts, 772, Bish. 1130, Shear Neg., Whart. Neg., Hutch. Carr.

Cited, § 348, Hughes' Proc.; § 296, Gr. & Rud.

Ingalls stated: Negligence. Responsibility of carrier of passengers for defective vehicle. Coggs; Moak, Torts. 271-279; Winterbottom. *A carrier is held to a high degree of care.* Ingalls; Stokes: 206.

Carrier of passengers; safety due to. Coggs; Palmer, 120 N. Y. 170, 3 Am. R. R. & Corp. Rep. 41-45, 17 Am. St. 629, 2 Gr. 208-222*a*; Cincinnati, etc., 120 Ind. 469, 6 L. R. A. 241, n.

Liveryman; liability for horse and vehicle. Copeland, 157 Mass. 558, 19 L. R. A. 283, n., 34 Am. St. 314; Jones: 376; Lynch, 163 Mass. 160, 47 Am. St. 444; Winterbottom.

Elevators; same rule applies to. Southern B. & L. Ass'n v. Dawson; Treadwell, 80 Cal. 574, 5 L. R. A. 498, n.

Railroads; duty to furnish improved appliances. Greenlee, 122 N. C. 977, 65 Am. St. 734, 744, ext. n.

Leading Cases.—353. Ingalls.

Common carriers are bound to use the greatest care, but are not insurers. *Readhead v. Midland, etc. Ry.* (1869), L. R. 5 Q. B. 379, 2 Q. B. 412, 8 B. & S. 371; 12 Mews' E. C. L. 480; on appeal, 9 B. & S. 519; Cool. Torts, Bish. Torts, Add. Torts. Whart. Neg., Shear. Neg., Pars. Conts., Add. Hutch. Carr., 2 Kent, 600, Busw. Pers. Inj. 378; Dodge, 148 Mass. 207, 12 Am. St. 451, n., 2 L. R. A. 83; Schoul. Bailm. *Diligence required where life is involved.* Bessemer, 121 Ala. 50, 77 Am. St. 17-30, ext. n.

354. HOLLISTER v. NOWLEN (1838), 19 Wend. (N. Y.) 234, 32 Am. Dec. 455, Thomp. Lead. Cas. Pass. 489, Greenh. Pub. Pol. 1 Add. Torts, 656, 2 Gr. Ev. 215, Cool. Bish. 3 Suth. Dam., Pars. Conts., Chit. Add. Laws. 229, Sto., Whart., Hughes' Conts., Bigl. Fraud, 2 Kent, 608, Busw. Pers. Inj., Whart. Neg., 6 How. 383, Schoul. Bailm.. § 18, Hughes' Conts.

Cited, §§ 303, 304, 296, Gr. & Rud.

Hollister stated: Hollister was a passenger, with trunk, on Nowlen's stage from Utica to New York. The stage line displayed at all stations: "All baggage sent or carried on the Telegraph Line is at the risk of the owners thereof." The trunk was lost and H. sued N. for its value, who defended upon the ground that by special contract he was exempt from liability, and that this contract arose from the notices displayed at the stations, and to these were added H.'s *presumed knowledge* and *silence. Held,* N. was liable.

Conditions indorsed on tickets limiting value of baggage must be agreed to. The Kensington (1902), 183 U. S. 262. Right views of the foregoing are truly important. They greatly affect the pleadings and proofs. Kansas R. R. v. Rodebaugh (1887), 38 Kan. 45, 5 Am. St. 715, 720, ext. n. (baggage).

Posted notices and indorsements do not limit liability as to baggage. Malone, 12 Gray, 388, 74 Am. Dec. 598, n., Huff. & W. Cas. 19 (ignorance of offered terms, no contract); Webbe, 169 Ill. 610, 61 Am. St. 207-218, n.

Stipulations indorsed on telegraph messages are binding in the absence of fraud and gross negligence. Coit, 130 Cal. 657, 80 Am. St. 153, n. See Fonseca, 153 Mass. 553, 25 Am. St. 660, 12 L. R. A. 340, Huff. & W. 15 (acceptance of conditions indorsed on ticket presumed).

Discriminating contracts of common carrier. Scofield v. R. R., *sub,* Penn.; New Jersey Co., 6 How. 344, 12 L. ed. 465, n.

Public policy governs contracts of carriers. R. R. v. Lockwood; Salus, etc.; Greenh. Pub. Pol. 509-528, R. R. v. Mfg. Co. (1873), 16 Wall. 318, 2 Add. Torts, 665: cases; Hollister; Coggs; notes; Smith, L. Cas.

Fraud; gross negligence cannot be contracted against. *Pactis,* etc.; *Nulla pactione,* etc.; *Volenti,* etc.; Bro. Max. 695, 696. Employer liable for independent contractor's torts. *Sub,* Hilliard; Hay; § 18, Hughes' Conts.

Leading Cases.—

355. NEW YORK CENTRAL R. R. CO. v. FRALOFF (1879), 100 U. S. 24, 25 L. ed. 331, Thomp. L. C. Carr. & Pass. 502, Hutch. Carr. 769: quoted, 1 Am. & Eng. Enc. L. 1042-1045; Laws. L. C. 212, Cool. Torts, Bish. Torts, 3 Suth. Dam., Jones, Construct. 254, Ror. R. R., 2 Pars. Conts. 211, 3 L. R. A. 345, n., Schoul. Bailm. Cited, § 303, Hughes' Proc.; § 296, Gr. & Rud.

R. R. v. Fraloff stated: Baggage, what is. Fraloff, a Russian countess, as a passenger, was carrying in her trunk two hundred and seventy-five yards of lace, valued at $75,000. The jury found it worth $10,000. *Held,* this, as a matter of law, was not baggage. Hutch. Carr. 679-688.

R. R. v. Swift stated: Swift, a surgeon in the United States army, delivered to the carrier his surgical instruments and other goods for carriage as baggage, without concealment or fraud, and as such they were received. These consisted of table silverware, $204.50; three buffalo robes, two deer robes, hair mattresses and pillows, and other household goods and jewelry, $787.50; surgical instruments, $330. These weighed 2,700 pounds. He was traveling as an officer, and under special privileges. The car carrying the goods was selected by the commanding officer, and was practically under military control, but the railroad company acquiesced in the situation and insisted on the enforcement of no regulations or conditions. The car was burned from unknown causes. *Held,* the carrier was liable.

Hannibal R. R. v. Swift, 12 Wall. 262, 20 L. ed. 425, n.: cited, Cool. Torts, 769, 770; Hutch. Carr. 685: cases; Whart. Neg. 594-613; Oakes, 20 Or. 392, 12 L. R. A. 318, 4 Am. R. R. & Corp. Rep. 571-579, n.: cited, Hutch. Carr. 685: cases; Hutchings, 25 Ga. 61, 71 Am. Dec. 156-163, n.: cases; Carpenter, 124 N. Y. 53, 11 L. R. A. 759, ext. n., 21 Am. St. 644; *Kansas City R. R. v. Rodebaugh* (baggage, liability for); Ry. Co. v. Berry (1895), 60 Ark. 433, 46 Am. St. 212, n.; Wood v. R. R., 98 Me. 989, 99 Am. St. 339-392, ext. n. (liability of common carrier for).

Liability of carrier after baggage has reached destination of carriage. Kansas City, 63 Ark. 344, 36 L. R. A. 781, n.

Common carriers; passengers; baggage. What is "baggage" for which carrier is held responsible. *New York Central R. R. v. Fraloff;* Hutch. Carr. 679-690: cases.

Baggage check; what it implies. Hutch. Carr. 718; *Expressio eorum,* etc. *Merchandise is not. Humphreys v. Perry* (1893), 148 U. S. 627, 37 L. ed. 587, n., 7 Am. R. R. & Corp. Rep. 686-704, Hutch. Carr. 685; *Cahill v. Ry. Co.* (1863), 13 C. B. (N. S.) 818 (106 E. C. L. R.); Mews' E. C. L. 60.

Liability for baggage not accompanied by a passenger. Marshall, 126 Mich. 45, 55 L. R. A. 650, ext. n. *Merchandise carried as baggage.* Ill. Cent. R. R., — Ky. —, 60 L. R. A. 846, n. *Baggage; luggage.* Under control of passenger in his compartment, carrier is not liable for.

Bergheim v. R. R. (1878), L. R. 3 C. P. D. 221, Mews' E. C. L., 2 Pars. Conts. 210,

Leading Cases.—355. N. Y. C. R. R.

Hutch. Carr. 793; *contra,* Coggs: 350. *Baggage, generally.* Hutch. Carr. 677-717 (excellent *resume*), 2 Ror. R. R. 988-1003; Bish. Torts, 1150-1163, Suth. Dam., 1 Am. & Eng. Ency. Law, 1042-1045, 2 Kent, 601, Schoul. Bailm.

356. CALYE'S CASE (1634), 8 Coke 32, 1 Smith, L. C. 248-257, ext. n., 8th ed., 11th ed., 20 Vt. 320, 62 Am. Dec. 577, 586, 590, 2 R. R. 593, 13 Rul. Cas. 118, 119, 24 Mo. Ap. 386, 2 Kent, 593, 2 Pars. Conts., Chit., Cool. Torts, Bish., 2 Add. Torts, 684, 69 L. R. A. 658, Bro. Max. 708, Whart. Neg., 2 Kent, *q. v.,* 1 Kinkead, Torts, 120-123, Schoul. Bailm., Laws. Bailm.; Bennett v. Mellor, *post;* 2 Am. & Eng. Cas. 16.

Cited, § 284, Hughes' Proc.

Calye's stated: Innkeepers. A guest arriving at an inn alighted from his horse and told the landlord to send it out to pasture. This was done at the guest's special instance and request, and the horse was not afterward found. The landlord was sued, and defended upon the ground that he was not liable under the circumstances, and so the court held. Otherwise, had the horse been sent to pasture without the guest's authority.

Berkshire Woolen Co. v. Proctor, 7 Cush. 417, Cool. Torts, Bish., Pars. Conts., Chit., 2 Kent, 596 (liability of innkeeper for guest's luggage); Coskery, 83 Ga. 696, 6 L. R. A. 483, Cool.; Glenn, 93 Ala. 342, 12 L. R. A. 382, n. (liability as bailee); Cunningham, 42 W. Va. 671, 57 Am. St. 878, n., 35 L. R. A. 850, McDaniels, 26 Vt. 316, 62 Am. Dec. 574-592, ext. n.: cases (instructive case).

Relation of landlord and guest must exist. Bennett v. Mellor (1793), 5 Term Rep. (D. & E.) 273, 2 R. R. 593, 13 Rul. Cas. 118: stated, Calye's; Strauss Co., L. R. 12 Q. B. D. 27, 49, 13 Rul. Cas. 121.

Liens of innkeepers. Singer Mfg. Co., *supra;* Elliott, 105 Mich. 506, 53 Am. St. 461, n.; 13 Rul. Cas. 118-140: cases; Schoul. Bailm.; Werthimer: 138 Wash. 409, 107 Am. St. 864-879, ext. n.

Lien extends to goods of third person. Threfall v. Borwick (1875), L. R. 10 Q. B. 210-212, 13 Rul. Cas. 136; Robins, 2 Q. B. Div. 501-510, 13 Rul. Cas. 138, 21 L. R. A. 230, 24 Mo. Ap. 386.

Does not extend to goods of third persons under a statute of broad terms. McClain, 11 S. Dak. 227, 49 L. R. A. 610, n. See Taylor: 219: cases.

Purchasing liquor at an inn constitutes one a guest. McDonald, 5 Barb. 560, citing Bennett v. Mellor, *supra;* or beer and cigars. Fairchild, 36 Barb. 153: cited, 13 Rul. Cas. 130: cases.

Liability of innkeepers for care, diligence and good faith. Carhart, 114 Ga. 632, 88 Am. St. 45, n.; Johnson, 89 Minn. 310, 99 Am. St. 571-602, ext. n. (liability for loss of property).

Liability for goods. Baehr v. Downey, 133 Mich. 163, 103 Am. St. 444, n., 2 Am. & Eng. Cas. 16.

Bailments; innkeepers; rights, duties and liens of. Coggs; Berkshire; Fay, 93 Cal. 253, 27 Am. St. 198, n.

Livery-stable keepers and innkeepers. Whart. Neg. 675-693. *Hotels and boarding-houses.* Bish. Torts. 1164-1183.

What is delivery to. Bradley, 66 N. J. L.

Leading Cases.—356. Calye's Case.

654, 55 L. R. A. 208 (citing Calye's Case).

Innkeepers bound to receive guest if possible. 1 Bish. C. L. 572. See S. v. Steele, 106 N. C. 766, 19 Am. St. 573, n.; Cool. L. Torts. 266. Innkeepers. 2 Kent, 592-597.

Who are "guests" and "boarders." Singer Manuf. Co., 52 Minn. 516, 38 Am. St. 568, n., 21 L. R. A. 229, n.; Churchill, 96 Cal. 490, 35 Am. St. 199, n., 13 Rul. Cas. 130; Lynar, 36 U. C. Q. B. 231: stated, 62 Am. Dec. 590; Murray, 9 Colo. 482, 59 Am. Rep. 152; Amey: 68 N. H. 447, 39 L. R. A. 760 (loss of a hat at a banquet). Tulare: 112 Tenn. 215, 105 Am. St. 940, ext. n.; Schoul. Bail. 276.

Protection due to guests. An innkeeper guarantees the good conduct of all members of his household and of his employees and servants. Cunningham, *supra.* He is a policeman, so to speak. Craker. Drunken or negligent conduct of guest does not excuse landlord from the acts of his servants. Cunningham; Schoul. Bail. 323.

Personal protection must be extended. Weeks, 101 Tenn. 495, 70 Am. 693, n.; Craker, *post:* cases: Rahmel; Claney, — Neb. —, 69 L. R. A. 642, n., 131 Fed. 161. Saloon-keepers must protect guests. *Sub,* Scott v. Shepherd. *Proof of loss: Res ipsa loquitur.* Murray, *supra:* 2 Kent. 581, Schoul. Bailm. 192; Murray, 2 Daly, 102. The fact of loss proved makes a *prima facie* case: *Res ipsa loquitur;* Kearney: 211. See Pullman, 3 Colo. App. 540 (*prima facie* case; destroyed or canceled if contradicted by one witness).

357. KANSAS CITY, M. & B. R. v. RILEY (1891), 68 Miss. 765, 4 Am. R. R. & Corp. Rep. 654-659, n., 24 Am. St. 309, 13 L. R. A. 39.

Carriers; refusing coupon for return trip; expulsion of passenger. When one conductor returns the wrong coupon, and a second conductor refuses that coupon for passage, and, after an explanation, expels the passenger, the carrier is liable.

Sloane, 111 Cal. 668, 32 L. R. A. 193, n.; Hot Springs R. R., 65 Ark. 177, 67 Am. St. 913, n.

Where there are two routes a mistake as to one of those from misdirection of the agent will not justify ejection. Ill. R. R. —Miss.—, 64 L. R. A. 283. *Ejection of passenger; rights of carriers.* K. v. R.; Hutch. Carr. 495-634. *Place for ejection.* Burch, 3 App. D. C. 346, 26 L. R. A. 129-135, ext. n. Exposure of drunken passenger from. Roseman, 112 N. C. 709, 19 L. R. A. 327-330, n., 34 Am. St. 524; Louisville & N. R. R., 108 Ala. 62, 31 L. R. A. 372, n.

For non-payment of fare. Wardwell, 46 Minn. 514, 13 L. R. A. 596, n.; MacKay, 34 W. Va. 65, 9 L. R. A. 132; St. Louis R. R., 69 Ark. 186, 53 L. R. A. 220, n.; Peabody, 21 Or. 121, 12 L. R. A. 823, n.; South Fla. R., 25 Fla. 40, 3 L. R. A. 733 (need not allege compliance with rules, and intention to comply).

Tickets with conditions. These must be complied with; non-observance of, is a ground for expulsion. Edwards, 81 Mich. 364, 3 Am. R. R. & Corp. Rep. 166, n.; Penn. R. R., 55 N. J. L. 551, 39 Am. St. 654, n., 22 L. R. A. 251; Robinson, 105 Cal.

Leading Cases.—357. Kan. City.

541, 28 L. R. A. 773, n. (stop-over privileges).

Assignability of tickets. Nichols, 23 Or. 123, 18 L. R. A. 55-60, n., 37 Am. St. 664, n.; Quimby, 150 Mass. 365, 5 L. R. A. 846 (railroad may exonerate itself by conditions); Trezona, 107 Ia. 22, 43 L. R. A. 136; Louisville & N. R. R. v. Turner, 100 Tenn. 213, 43 L. R. A. 140.

Regulations by carriers. Gray, 11 Fed. 687, ext. n.; Dickerman, 44 Minn. 433, 3 Am. R. R. & Corp. Rep. 377, n.; 1 Mor. Corp. 497, 2 Cook, Stock. 700, n., 2 Kent, 393-296, 16 Rul. Cas. 667-680, n.; McGowen, 41 La. 732, 5 L. R. A. 817, n.

Damages for expulsion. Hall, 15 Fed. 95, n.; Lucas, 98 Mich. 1, 39 Am. St. 517, n. (exemplary damages, when allowed); note, 37 Am. St. 357; Sloane, *supra. Detention for non-payment of fare.* Note, 15 Fed. 94; Allen: 167, *sub,* McManus; Palmer: 92 Me. 399, 44 L. R. A. 673. *Resisting expulsion.* 15 Fed. 89. *Traveling beyond distance paid for.* 17 Ir. L. T. 599.

Assault and battery. Profane and indecent language ground for expulsion. P. v. Caryl (1857), 8 Park. C. C. 326, 5 Crim. Def. 813.

Protection of passengers a duty. Craker; N. J. Steamship, 121 U. S. 637, 40 L. R. A. 488. Fewings, 88 Minn. 336, 97 Am. St. 519 (from mobs and strikers). Carrier liable for bite of another passenger's dog. 41 Wash. 618, 111 Am. St. 1038-1039, n.

Reasonable regulations of company must be obeyed. P. v. Caryl, *supra;* Vandusan, 97 Mich. 439, 37 Am. St. 354 (must produce ticket): Sternburg, 36 Neb. 307, 19 L. R. A. 570, n.

Failing to produce check and to reasonably comply with request for identification, is ground for expulsion. Lucas R. R., *supra.*

Coupon tickets. For continuous passage, unless expressly so stipulated, stop-over privileges are allowed at the end of each connecting line. Nichols v. S. P. Co., 23 Or. 123, 37 Am. St. 664, n., 18 L. R. A. 55-60, n. *Expressio eorum,* etc. *Objections to a ticket on one ground exclude all others.* Nichols, *supra. Expressio unius,* etc. Declarations of agent bind principal, if within *res gestæ.* Nichols, *supra;* 37 Am. St. 671, n.; P. v. Vernon; *Res inter alios,* etc.

Face of the ticket is all conductor can look to; statements of passengers cannot prevail over. Poulin, 52 Fed. 197, 17 L. R. A. 800, n. See Cherry. Invalid transfers; duty of holder. Little Rock Street R. R. (1906), — Ark. — 95, S. W., 7 L. R. A. N. S. 97.

Oral evidence may explain ticket. Ames v. So. P. R. R., 141 Cal. 728, 99 Am. St. 98-107, n.

Seat for passenger is not essential before demand for his ticket. Passenger owes for ride without a seat, and after obtaining one, he must pay for the entire ride, or be expelled. Davis, 53 Mo. 317, 14 Am. Rep. 457-460; Manning, 95 Ala. 392, 36 Am. St. 225, n., 16 L. R. A. 55; Louisville R. R., 69 Miss. 421, 22 L. R. A. 259 (must either pay or leave car). And

Leading Cases.—357. Kan. City.

regular car accommodation, if possible. Balt. R. R., 81 Md. 400, 31 L. R. A. 313, ext. n. *Railroad employees as passengers.* Tex. R. R., 67 Fed. 524, 31 L. R. A. 321, ext. n.

Leaving carriage without notice before end of journey. Finnegan, 48 Minn. 378, 15 L. R. A. 399, n. One leaving a street car without advising the person in charge of it of his intention to return loses his status as a passenger. Central Ry., 69 Md. 257, 9 Am. St. 425.

Getting on and off trains. Carr, 98 Cal. 366, 21 L. R. A. 354-365, ext. n. *Duty of carrier to assist.* Little Rock, 55 Ark. 428, 29 Am. St. 48, 15 L. R. A. 434, n.

Duty to infants and other passengers; regulation of trains; starting, stopping, calling out stations, and stopping at these. Hemmingway, 72 Wis. 42, 7 Am. St. 823, ext. n.

Rejection of certain passengers; carrier's right to. Ill. Cent. R. R. 85 Miss. 344, 107 Am. St. 293-303, ext., n.

Gamblers; may refuse to carry. Thurston v. U. P. R. R. (1887), 4 Dill. 321.

Sick passengers, if accepted, must be aided and attended. Weightman, 70 Miss. 563, 35 Am. St. 660, 19 L. R. A. 671, n.; Croom, 52 Minn. 296, 38 Am. St. 557, 18 L. R. A. 602, n.; Foss, 66 N. H. 256, 49 Am. St. 607, 11 L. R. A. 367; R. R. 52 Ohio, 558, 49 Am. St. 745, 31 L. R. A. 261, ext. n.

Passenger and carrier; when the relation begins; carrier's duty. Hansley, 115 N. C. 602, 44 Am. St. 474, n.; Ill. Cent. R. R., 168 Ill. 115, 61 Am. St. 68-104, ext. n. (who are passengers).

Extra fare for payment on train. Phettiplace, 84 Wis. 412, 20 L. R. A. 483-487, n.; Johnson, 108 Ga. 496, 46 L. R. A. 502: cases. *Announcement of stations by carriers.* Texas R. R., 82 Tex. 302, 15 L. R. A. 347, n. *Discriminations.* Schofield v. R. R., *sub,* Penn.

Colored passengers; separate accommodations for. Plessy, 45 La. Ann. 80, 18 L. R. A. 639, 7 Am. R. R. & Corp. Rep. 383-394, ext. n.; Chilton, 114 Mo. 88, 19 L. R. A. 269.

Right of passenger to pay fare after train begins to stop for purpose of ejecting him. Ga. R. R., 88 Ga. 529, 16 L. R. A. 53, n.

Refusal to pay for distance already ridden without ticket will justify permanent ejection. Manning, 95 Ala. 392, 16 L. R. A. 555, n., 36 Am. St. 225.

Negligent exposure of person; arm out of window. The contract is to carry in, not out of car. Richmond R. R., 88 Va. 958, 16 L. R. A. 91, n. Duty of carrier in stopping and starting trains. Highland R. R., 92 Ala. 291, 13 L. R. A. 95, n.

Sleeping-car company liable for misinforming passengers as to place to get off. Pull., 79 Tex. 468, 13 L. R. A. 215, n. Passing from one car to another when train is in motion. McAfee, 9 D. C. App. 36, 34 L. R. A. 720, ext. n. *Volenti,* etc.

Leading Cases.—357. Kan. City.

Adult in charge of minor child is liable for its fare, and may be ejected upon refusal to pay its fare, upon tender of fare paid or a stop-over to adult for himself. Lake S., 55 Ohio St. 589, 38 L. R. A. 140, ext. n.

Infant procuring commutation ticket by means of fraud can only recover as a trespasser law. Fitzmaurice, — Mass. —, 6 L. R. A. N. S. 1146.

Minimizing damages. Passenger should pay fare, if possible, to lessen damages for expulsion. Springer, 15 Wash. 660, 43 L. R. A. 706, ext. n. See Cherry.

Ticket as a contract. Boyd, 103 Ga. 828, 68 Am. St. 146. Cherry.

Limitation as to time. Only statute of limitations bars a full-fare ticket; and a limitation of time expressed on side is of no avail unless expressly assented to. Boyd, *supra.* 84 Am. St. 397. A railroad ticket does not express all the contract. Boyd. *Expressio eorum,* etc.

Thurston v. U. P. R. R. (1877), 4 Dill. 321, Thomp. L. C. Carr. Pass. 10, Bish. Torts, 1061, Hutch. Carr. 540-547.

Thurston stated: T. was a gambler and bought a ticket, but the railroad company refused to carry him, for the reason that he gambled with the passengers and won their money. T. sued, but all he could recover was $1.74, the price of the ticket.

Common carrier; whom carrier may refuse to carry. Pearson; Hutch. Carr. 541.

Carrier bound to accept all persons. Pearson, 4 Wall. 605, 13 L. ed. 447, n. (exceptions to general rule); Hutch. Carr. 541.

Ejection. Expulsion of passenger from car while car is in motion is negligence. Chicago Ry., 33 Ill. App. 455, 2 R. R. & Corp. Rep. 616-619, n., 33 L. ed. (U. S.) 460. *Ejection of passenger, grounds for.* Notes, 33 L. ed. (U. S.) 460; K. C. R. R.

Carrier owes the passenger protection; Craker. And is analogous to that which the innkeeper owes a guest. Calye's Case. Common carriers. Schoul. Bailm. Hutch. Carr.

358. GOOD v. ELLIOTT (1790), 3 Term, Rep. (D. & E.) 693, 1 R. R. 803, 11 Rul. Cas. 389-407, n., 1 Page, 9, 449, Chit. Conts., Pars., Bish., Ham., Whart., Laws., Sto., Clark, Hughes' Conts.; cited, 2 Rand. Com. Pap. 510, 513, 1 Danl. 195, Gr. Pub. Pol. 227. Cited, §§ 158, 299, Hughes' Proc.

Wagers. Wagers are valid at common law if not against public policy, or indecent, or such as to injure the feelings of third persons.

Good; Bunn; DaCosta; Ditchburn; Diggle; Evans; Holman; Eddy Combinations 98. Cothran v. Ellis.

Are generally void. Irwin v. Williar (1883), 110 U. S. 499, 28 L. ed. 225, n.; Bish. Conts. 531, Bish. Stat. Crimes, 848; Shaffner, 133 Ill. 410, 23 Am. St. 624, n. (horse racing illegal), 81 Am. St. 275, n. *Bernard v. Taylor* (1893), 23 Oreg. 416,

Leading Cases.—358. Good.

18 L. R. A. 859-864, n., 37 Am. St. 693-704, ext. n.; Huff. & W., Conts. 407, stating Good; Bunn; DaCosta, and other cases.

Wagers; right to withdraw from. Diggle: 371; Spring Co.; 366 Pabst Co., 80 Minn. 473, 81 Am. St. 275, n. Grain options; when legal. Irwin, *supra*, n., Bish. Conts. 534; Sprauge, 26 Neb. 326, 3 L. R. A. 679, n. *Gambling contracts, generally.* Gr. Pub. Pol. 222-237, 2 Chit. Conts. 1006-1010.

Gaming, the law of the offense. Bish. Stat. Crimes, 844-881; 4 Crim. Def. 624-749; 9 Encyc. Pl. & Pr. 765-804. Betting on elections. Bish. Stat. Crimes, 931-949.

Lotteries. Bish. Stat. Crimes, 950-966; Yellowstone, 88 Ala. 196, 16 Am. St. 38-48, ext. n., 7 L. R. A. 599; Harvey, 150 Mass. 1, 5 L. R. A. 200, n.; First Nat. Bk., 80 Ia. 11, 8 L. R. A. 275, n.

Generally. 1 Chit. Conts. 735-738, 1 Add. Conts. 276-280. *Betting; wagers; gaming and wagering.* 11 Rul. Cas. 376-407, n. Aiding and abetting. Bish. Conts. 535; Pearce: 368.

Option contracts. Cobb, 15 Fed. 774, 12 Am. Law. Reg. (N. S.) 600-619, ext. n.; Crawford, 92 Mo. 498, 1 Am. St. 745-766, ext. n.

359. DITCHBURN v. GOLDSMITH (1815), 4 Camp. (Eng.) 152; 2 Pars. Conts. 880, 1 Chit. 737, Whart. 449, Laws. 284, Sto. 698, Clark, 406, Hughes' Conts., 2 Rand. Com. Pap. 510, Gr. Pub. Pol. 227, Mews'.

Ditchburn stated: Indecent wagers are void *e. g.*, as to whether an unmarried woman will have a child a certain day.

360. EVANS v. JONES (1839), 5 Mees. & Wels. 77, 2 H. & H. 67, Gr. Pub. Pol. 227, 1 Chit. Conts. 737, 738, Smith, 265, Whart. 450, Laws. 284, Clark, 406, Sto. 696, 697, Hughes' Conts., 7 Mews' E. C. L.

Evans stated: wagers. A bet that one will be convicted of a criminal charge is not enforceable because it gave one party an interest in obstructing or corrupting the fountains of justice.

Construction makes contracts to accord with the usefulness, respectability, morality and perpetuity of government. Trist: 214.

361. DA COSTA (DE) v. JONES (1778), 2 Cowp. 729, Gt. Opin. Gt. Judges, 107, 12 Rul. Cas. 376-385, n.; 1 Page, 449, 2 Rand. Com. Pap. 510, Danl., 195, Gr. Pub. Pol. 227, Pars. Conts., Chit., Bish., Ham., Whart., Laws., Sto., Hughes' Conts., 1 Pars. N., 2 Pom. Eq. 929, 1 Sto. Eq. 294, 1 Wh. Ev. 283, Mews' E. C. L.

Wagers. Wagers, if indecent, cannot be recovered, *e. g.*, a wager as to the sex of a person.

Gaming and wagering. 12 Rul. Cas. 376-407, ext. n.

362. BUNN v. RIKER (1809), 4 Johns. 426, 4 Am. Dec. 292-300, n.; Gr. Pub. Pol. 391, Pars. Conts., Chit., Whart., Sto., Clark, Laws., 1 Page, 449, Hughes' Conts., 3 Kent, 277. *Wagers.* Wagers on an election void at common law.

Bunn; Evans; Good; Brogden; Da Costa; Holman. But otherwise as to wagers generally. Good.

Leading Cases.—362. Bunn.

One may withdraw from a bet before the money is paid over. Diggle: 371.

Wagers valid in England but otherwise in Massachusetts. Love, 114 Mass. 80, Huff. & W. Conts. 324.

363. HOLMAN v. JOHNSON (1775) 1 Cowp. 341, Finch, Cases, 617, Suth. Stat. 12, Gt. Opin. Gt. Judges, 97, Benj. Sales, 2 Mech. Sales, 995, 997, Gr. Pub. Pol. 127, 587, End. Stat. 454, 2 Kent. 467, Mews' E. C. L., Cransom, 107 Mass. 439, 9 Am. Rep. 45, n.; Graves, 156 Mass. 211, 32 Am. St. 447, 15 L. R. A. 834; Huffc. & W. Conts. 391; Nester, 161 Pa. 437, 24 L. R. A. 247, 10 Am. R. R. & Corp. Rep. 205; Mech., Sto., Whart. Ag., Pars., Bish., Chit., Beach, 1 Page, 507, 532; 9 Cyc. 546, Add., Keener, Conts. 849, Smith 19, Whart., Sto., Clark, Laws. 346, Ham. 233, 256, 260, Beach, Hughes' Conts., Williston, Conts. 229, Sto. Eq., Pom. Eq., Pars. Part., Lind. Part., Rand. Com. Paper, 2 Best, Ev. 546, Suth. Stat. 12, Sedg. Stat. 70-84 (contracts in violation of statutes); Bro. Max. 739.

Cited, p. 39; §§ 4, 5, 133, 147, 154, 158, 326, 333, Hughes' Proc.

Cited, §§ 280, 285, 292, 307, Gr. & Rud.

Holman stated: H. was a tea merchant doing business in Dunkirk, France, where he sold and delivered to J. tea which the buyer intended to smuggle into England, and this H. knew. Afterward H. sued for the price and J. defended upon the ground that the contract was illegal: *In pari delicto potior est conditio defendentis. Held,* H. could recover; that the sale of the tea was a positive right—was not an act *malum in se,* but only *mala prohibita.* Had the seller himself undertaken to have delivered the goods in England, the defense of illegality would have been perfect.

Graves; McKinnell, *sub,* Pearce, 368, *Tracy v. Talmage* (1856), 14 N. Y. 162, 67 Am. Dec. 132-154, n., Cummings, Cas. Corp. 67, Ans. Conts., Bish., Bigl. Fr. 169; cited, G. Pub. Pol. 17, 592, 596, Pom. Eq.

Knowledge of seller that buyer is buying a thing to put to unlawful use will not render the vendor a particeps criminis. Anheuser, 44 Minn. 318, 20 Am. St. 580, n., 9 L. R. A. 566, 2 Benj. Sales, 789; Graves, *supra.* See Pearce; Smith, Conts. 18, n., 251, citing *Bartlett v. Vinor;* 1 Kent, 467, Suth. Stat. 335; *Parsons v. Trask,* 7 Gray, 473, 66 Am. Dec. 502-514, ext. n. (contract contrary to public policy of forum unenforceable—contract for slavery); Garrett, 113 Mo. 330, 35 Am. St. 713, n. (equity will not aid); Levy, 18 Colo. 532, 36 Am. St. 303, n.

Contract mala prohibita where statute prescribes a penalty. Generally only this can be enforced. It does not nullify the contract. Ans. Conts. 171, 172: *contra cases. Contracts in violation of statutes.* Brooks, 50 N. J. Eq. 761, 35 Am. St. 793, n., 21 L. R. A. 617, End. Stat. 449-474. Bartlett v. Vinor (an old and widely cited case). Smith, Conts. 18, n., 251. School teachers cannot be hired or paid in violation of a statute; if it requires that the teachers have a certificate, this must be

obtained. Hosmer, 4 N. Dak. 197, 50 Am. St. 639, n.

Illegal contracts are non-enforceable. Bartle, 4 Pet. 184, 7 L. ed. 825, n., Howell, 3 Ga. 176, 46 Am. Dec. 415, n. (this is a very instructive case, with extended citations); 1 Danl. Nego. Insts. 195; Parsons, *supra;* Tracy; Nellis v. Clark (1838), 20 Wend. 24; cited, Gr. Pub. Pol. 17, 30, 128, 163; *sub,* S. v. Nebraska Distilling Co.; Woodson: 85, Miss. 171, 167 Am. St. 275-290: cases; 1 Page, 517; Hobbs: 195, Mo. 693, 113 Am. St. 709-736, ext. n.

Policy forbids enforcement of illegal contracts. Armstrong v. Toler (1826) 11 Wheat. 258, 6 L. ed. 468, n.; Huffc. Ag. 27 (legality of subject), Smith, Conts. 259-260; *Salus populi,* etc.; Bartle, *supra; Illegal contracts. In pari delicto,* etc.; Goodrich, 144 Ill. 422, 32 Am. St. 459, n., 19 L. R. A. 371, End. Stat. 449-474, Huff. & W. Conts. 315-411.

Statute may invalidate commercial paper even in hands of innocent holder. Irwin, 26 Ind. App. 383, 84 Am. St. 297; Pritchett, 26 Ind. App. 56, 84 St. 274, n.

Degrees of delictum are sometimes considered and recovery is allowed. In jure non remota, etc. *Brooks v. Martin:* 370; De Leon, 49 Tex. 88, 30 Am. Rep. 101; cited, Gr. Pub. Pol. 109, Bish. Conts. 489; Buck, 26 Vt. 184, 62 Am. Dec. 564: stated, Gr. Pub. Pol. 530; Evans, 24 Pa. 62, 62 Am. Dec. 359: stated, Gr. Pub. Pol. 162, 164, Bro. Max. 728.

Undue influence inducing the illegal contract will be relieved against. Hess, 77 Mich. 598, 18 Am. St. 421, n.; Harper, 85 Ky. 160, 7 Am. St. 583, n.; *Diggle; In pari delicto,* etc.

Lobbying contracts. Tool Co.: 365; Spring Co.: 367; Trist: 214.

Public officers; contracts concerning appointments, etc. Tool Co.; Mech. Pub. Off. 351.

Champerty; maintenance; barratry. Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 20 Johns. 380, 15 Am. Dec. 308, ext. n.; S. v. Chitty; Ackert, 131 Mass. 436, Huff. & W. Conts. 354 (strict rule applied; *contra,* cases in note); 83 Am. St. 157-180 (contracts with attorneys). See CHAMPERTY. *Damages arising from illegal transaction non-recoverable.* 1 Suth. Dam. 5.

Contract in restraint of marriage. Lowe v. Peers; Maddox, 11 Gratt. (Va.) 804, Perry, Trusts, Crawford, Mech. Ag. 36, Chit. Conts., 3 Add. 1349.

Divorce; contracts facilitating, are void. Sayles, 21 N. H. 312, 53 Am. Dec. 208, n., Gr. Pub. Pol. 491; Greene, 2 Gray, 361, 61 Am. Dec. 454, n.

Marriage contracts founded on promise of prostitution, void. Hanks, 54 Cal. 51, Ans. Conts. 187, Gr. Pub. Pol. 201, 2 Chit. Conts. 794. See Hood: 141.

One cannot contract for illegality or fraud. In pari, etc.: cases; *Pacta,* etc.; *Jus publicum privatorum,* etc.; 180 U. S. 476; *Pacta nulla,* etc. § 18, Hughes' Conts.

Illegal defenses need not be pleaded; in any way they appear the court will take notice of them. Here is a notable exception in the law of pleadings. Field, 84, § 5, 5*b*, Hughes' Proc.

Leading Cases.—363. Holman.

364. GULICK v. WARD (1828), 10 N. J. Law, 87, 18 Am. Dec. 389-404, n., 2 Rand. Com. Pap. 498, Gr. Pub. Pol., Chit. Conts., Bish., Whart. 402, Laws., Ham., 1 Page, 517, Hughes' Conts., 2 Pom. Eq. 934. Cited, § 158, Hughes' Proc.

Gulick stated: Stifling competition at auctions illegal. W. contracted and obligated to pay G. $1,000, if he would not make competitive bids to secure a mail contract of the United States. To recover that amount G. sued W. & B. *Held,* he could not recover; that contracts to stifle bidding at auction and other competition are void. Gr. Pub. Pol. 178-196; Kennedy, 371, 5 Harr. (Del.) 458; Swan, 20 Cal. 182. See Ray, 100 Ill. 246; Gulick, 41, Neb. 706, 43 Am. St. 720, n.; Herndon, 38 S. C. 357, 20 L. R. A. 545-555, ext. n.; Woodruff, 175 Pa. 302, 52 Am. St. 845, n. (judicial sales); Veazie, 8 How. 134; cited, Chit. Conts. *Puffers.* Flannery, 180 Pa. 338, 57 Am. St. 648, n.; McMillan, 110 Ga. 72, 78 Am. St. 93, n.: cases. Chilling bidding, 139 Mass. 51, 111 Am. St. 401.

Illegal contracts; contracts to prevent competition. Holman: 363; *In pari delicto,* etc. See AUCTIONS; 1 Chit. Conts. 409: cases; 3 Story, Conts. 624; Reynolds, 24 Tex. 174; Smith, 12 Vesey, 577, 8 R. R. 359, 33 Eng. Rep. 180, Mews' E. C. L.; 2 Kent, 538, 539; 2 Cool. Tax. 941-945 (competition at the sale).

365. TOOL CO. (PROVIDENCE TOOL CO.) v. NORRIS (1865), 2 Wall. 45, 17 L. ed. 868, 33 L. R. A. 167, Beach, Conts., Ans., Ham., Laws., Clark, Sto., Whart., Hughes, Laws., 115 N. C. 457, 44 Am. St. 464, Whart. Ag. 345, Mech., Huffc., Tiff., Reinhard, Cool. Const. Lim. 166, Mech. Pub. Off. 351, 2 Rand. Com. Pap. 498, Gr. Pub. Pol. 359, 364, 365, 2 Pom. Eq. 935, 3 Kent, 454.

Tool Co. case stated: Norris sued the Tool Co. to recover for services in influencing government officials to buy war supplies of the company. *Held,* he could not recover. Trist: 214; Oscanyan: 41. Hazleton v. Sheckells.

Agent cannot recover compensation if agency was unlawful. Tool Co.; Mech. Ag. 18-49, 645; *In pari delicto,* etc.; Houlton, 93 Wis. 393, 33 L. R. A. 166; stated, Tool Co.; Oscanyan: cases.

Illegal contracts. Agreements to influence officials are void. Holman; Trist; Spurgeon, 6 Ohio, 442, 27 Am. Dec. 266; O'Donnell, 5 Ala. 467, 39 Am. Dec. 336; Mills, 40 N. Y. 543, 100 Am. Dec. 535.

366. SPRING CO. v. KNOWLTON (1880), 103 U. S. 49, 26 L. ed. 347; Keener, Quasi Conts. 259, 264, 265, Beach, *q. v.,* Laws. 54, Whart. 353; 354, Hughes' Conts., 2 Benj. Sales, 787, n., 2 Mech. Sales, 999. § 158, Hughes' Proc.

Spring Co. stated: The company undertook to increase its stock $200,000, every old stockholder to have a full paid-up share

Leading Cases.—366. Spring Co.

of $100 for $80 (this was in violation of the statute of New York), and which, if not paid, then all payments made thereon to be forfeited, to which understanding K. was a party, and who took more of the stock than he could pay for. He could only pay 20 per cent of his undertaking. Afterward, the company abandoned the increase scheme and refunded all sums paid, but not the forfeited amounts paid. K. died and his representatives sued for the payments K. made and forfeited. The company defended upon the ground that the contract was illegal; that the whole undertaking was in violation of a public law. *In pari delicto,* etc., was their defense. *Held,* K. could recover; that the enterprise was not complete; that K. relented before the consummation of the enterprise, and that in such cases *In pari delicto,* etc., is no defense.

Contracts; illegal contracts. One standing *in pari delicto* in an illegal contract can have no redress from any court, except where illegal purpose is not complete. Holman; Pearce; Diggle, 367; *Pacti privatorum,* etc.; Bro. Max. 696, 697.

367. BEAUMONT v. REEVE (1846), 8 Q. B. 483 (55 E. C. L. R.), 70 R. R. 552, n., Ans. Conts., Pars., Chit., Bish., 1 Add. 3, 252, 1 Beach, 153, Ham., Smith, 203, Whart., Sto., Clark, Laws. 100, 319, Hughes' Conts., 2 Kent, 465, 2 Rand. Com. Pap. 516, Dan., 1 Pars. N., Gr. Pub. Pol. 206, Mews' E. C. L., 9 Cyc. 358, Sto. Eq. 296-297.

Cited, §§ 15, 156, 299, 353, Hughes' Proc.

Cited, §§ 52, 70, 169, 220, 285, 292, Gr. & Rud.

Beaumont stated: Caroline B. sued Henry R. in *assumpsit* on an oral promise, and asked a judgment against him upon a foundation gathered from these facts: That she had been his late mistress; that he debauched and induced her to live with him, whereby she had been injured in character and deprived of the means of procuring an honest livelihood; that they finally agreed to discontinue the immoral connection and live apart; and that defendant, as a compensation for the injury and in consideration of the premises, undertook to pay plaintiff a yearly sum toward her maintenance; which he had failed to do. *Held,* that from the foregoing facts no legal consideration appeared for the promise, and that such a state of fact would not constitute a foundation for a judgment.

A moral consideration will not support a promise. Eastwood: 336; Lee: 318; Wennall v. Adney (1802), 3 Bos. & P. 247, 6 R. R. 780, ext. note, stating Lampleigh: 301, and Trueman, Mews' E. C. L. (master not liable on implied promise to pay for medical attendance on a servant who has met with an accident in his service); Atkins, 2 East, 505, Mews' E. C. L.; Mills: 316.

(Wightman, J.: There is the word "debauched.")

"That does not necessarily mean that the plaintiff was chaste before her connection with the defendant." Every presumption is against the pleader. Dovaston: 217.

"I felt some doubt in this case; but, on considering the point, I agree that a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise. And clearly on the authorities, there is nothing here to raise any obligation beyond that. We therefore must act on the doctrine laid down in the note to *Wennall v. Adney.*"

The foregoing statement was subject to general demurrer, also motion in arrest of judgment and had judgment been entered thereon, then to collateral attack. Cooke: 321. *In pari delicto,* etc. Moore, *sub,* Cruikshank.

An illegal subject-matter will not attract jurisdiction. See JURISDICTION; S. v. Baughman: 268.

The rules of contract and of procedure act and react upon each other. See ADJECTIVE LAW; Texas R. R. v. Humble. Past cohabitation not sufficient to sustain a parol or oral promise. Wallace, 103 Ill. 229, 249, Gr. Pub. Pol. 206: cases; Finch, Conts. 620. *Otherwise if promise is under seal.* Ans. Conts. 187, 197; Ayerst, L. R. 16 Eq. Cas. 275. See SEAL; Collins.

Consideration. Moral consideration insufficient. Cumber; Chit. Conts. 52, Add, Conts. 13. Lee: 318.

In law Miss B. was not a wronged person, and R. was not a wrong-doer. See Seabury: 281; S. v. Baughman. A bad beginning cannot have a good ending, in law. *Quod ab initio,* etc. Cooke: 321.

An antecedent moral obligation will not support a promise. Note to Wennall v. Adney (discussing Trueman v. Fenton and Lampleigh v. Braithwait) 6, R. R. 782.

368. PEARCE v. BROOKS (1866), 1 Exch. 213, 4 H. & C. 358, 6 Rul. Cas. 325-492, ext. n.; Ans. Conts., Chit., Keener, 853, 1 Add. 252, Bish. 59, 508, Smith, 212, Whart. 341-343, 374, Laws. (reviewed and criticised), Sto. 671, Clark, 440, 480, Ham., 1 Page, 533, 9 Cyc. 517, Hughes, Williston, Cas. 231, Mech. Sales, *q. v.,* 2 Benj. 794, Gr. Pub. Pol. 597: cases, Bro. Max. 739, Bigl. Fraud, 170-178, 128-231, Mews' E. C. L.

Cited, §§ 154, 156, 345, Hughes' Proc.

Pearce stated: Pearce & Co., plaintiff, was a partnership, and let to B., a prostitute, a brougham in which to ride and make meretricious display and attract men. Only one of the partners knew of the uses made of the carriage. B. refused to pay for its use, and P. sued her. *Held,* P. could not recover upon such a contract. *In pari delicto,* etc. *Holman; Cannan v. Bryce* (1819), 3 Barn. & Ald. 179, 2 Benj. Sales, 793: stated, Ans. Conts. 192, Bish. 471, 535, 2 Kent, 466-468; Gr. Pub. Pol. 112, 2 Pom. Eq. 942, Bigl. Fraud, 170.

A sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. Graves. Cited, *sub,* Holman.

Advancements made to further and carry on

Leading Cases.—367. Beaumont.

Leading Cases.—368. Pearce.

illegality cannot be recovered. Pearce, *sub,* Holman; *M'Kinnell v. Robinson* (1838), 3 M. & W. 435 (S. P. as *Cannan v. Bryce*): stated, Ans. Conts. 193, Bish. 31, 35, Ham. 209, 247, 2 Benj. Sales, 793, 2 Kent, 487; cited, Gr. Pub. Pol. 94, 2 Pom. Eq. 942, Mews' E. C. L.

Knowledge of illegality as an element. Cannan; McKinnell, supra; Gr. Pub. Pol. 94: cases: Eddy, Combinations, 113; Bish. Conts. 535: cases (criticising Rose, 6 Colo. 102): Tatum, 25 Ark. 209, 94 Am. Dec. 717 (selling guns to aid rebellion is illegal); Anheuser, etc., 44 Minn. 318, 20 Am. St. 580, n., 9 L. R. A. 506, n.: cases; Tyler, 79 Me. 210, 1 Am. St. 301 (money loaned for gambling, if used, cannot be recovered); Miners' Ditch, 37 Cal. 543, 9 Am. Dec. 300-338, ext. n. (*ultra vires* contracts of corporations, if executed cannot be rescinded): Standard Furniture Co., 22 Wash. 670, 62 Pac. 145, 79 Am. St. 960 (furniture for bawdy house).

Loaning one money to gamble with constitutes one a particeps criminis. Appleton, 10 N. M. 748, 55 L. R. A. 93: cases. *Liability of carrier for transporting intoxicating liquors.* So Express, 107 Ga. 670, 46 L. R. A. 417, n.

Illegal contracts; prostitution. Contracts made to aid or in anywise connected with prostitution are illegal and void. *Sub,* Holman; Beaumont; Spring Co. *Ex dolo malo:* No cause of action arises out of fraud. Peck v. Ellis; *In pari delicto.*

Procuring evidence is illegal, because of its evil tendencies. Quirk, 14 Mont. 467, 43 Am. St. 647; Cobb, 40 Vt. 25, 94 Am. Dec. 370-378, ext. n.; Goodrich, 144 Ill. 422, 36 Am. St. 459, 19 L. R. A. 371, n.

Contracts for permanent employment and similar agreements. Carnig, 167 Mass. 655, 35 L. R. A. 512-518, ext. n. See Peter: 340.

Immoral contracts generally. 1 Add. Conts. 251, 6 Rul. Cas. 325-492, ext. n., Gr. Pub. Pol., 1 Whart. Conts. 360-374, Smith, 211, Add. Conts. 251.

369. HALL v. CORCORAN (1871), 107 Mass. 251, 9 Am. Rep. 30-38; Bigl. L. C. Torts, 440, Cool. Torts, 124, 178, 525, 1 Kinkead, Torts, 24, 25, Bigl. L. C. Torts 722, Sto. Conts. 754, 769, Whart., 1 Chit., Hughes' Conts., Week, Dam. Abs. Inj., 58 Neb. 25, 76 Am. St. 66. Cited, § 347, Hughes' Proc.

Hall stated: Action of tort for conversion of a horse. H. hired a horse to C. to drive to South Adams and back, but C. drove to Clarksburgh, two miles beyond, and so carelessly as to injure horse and sleigh. H. sued, and C. defended upon the ground that the whole transaction was on Sunday, and was not a work of necessity or charity and was in violation of a statute. (Bloom; *Dies Dominicus,* etc.). *Held,* H. could recover; that the defense was too remote. Brooks; Sutton. *Doolittle v. Shaw,* 92 Iowa, 348, 54 Am. St. 562, 26 L. R. A. 366-370, n.; Gross, 93 Iowa, 72, 26 L. R. A. 605 (both parties violating Sunday will not bar a recovery).

Leading Cases.—369. Hall.

Sunday laws; conversion. Horse hired to go one place, and driven to another, is conversion, and may be recovered for, although the contract was on Sunday. Hall; Brooks. Hiring a horse to be driven one place and then driving it to another is a conversion. Malaney, 60 Vt. 571, 6 Am. St. 135, Kink. Torts, 24, 25.

370. BROOKS v. MARTIN (1863), 2 Wall. 70, 17 L. ed. 732; Gr. Pub. Pol. 107, 23 Fla. 52, 11 Am. St. 333, 9 L. R. A. 695, Ans. Conts. 199, n., Pars. 92, Beach, Ham. 256, Whart. 343, 349, 473, Laws. 54, 222, Clark, Sto. 656, Hughes, 1 Page, 532, 536, 541, 1 Danl. Nego. Insts. 200, 1 Suth. Dam. 5, Bigl. Fraud, 344, 2 Benj. Sales, 788.

Cited, §§ 154, 156, 345, Hughes' Proc.

Brooks v. Martin stated: B. and M. formed a partnership to buy claims of Mexican soldiers, the law forbidding such traffic; but it did not declare that titles to lands obtained through such claims should be void, nor that such lands might not be subject to sale. The firm bought many claims, did a great business, and by sale and assignments acquired much land. Finally they sold their assets and closed up with B. in possession. M. sued for an accounting. *Held,* relief should be given. This case is widely cited and often criticised.

Gr. Pub. Pol. 107; Crescent Ins., 23 Fla. 50, 11 Am. St. 331; Ins. Co., 51 Ohio St. 270, 46 Am. St. 571; Pennington, 47 N. J. Eq. 560, 11 L. R. A. 587, n. (partnership; share of profits illegally acquired); *Manchester R. R. v. Concord R. R.* (1890), 66 N. H. 100, 3 Am. R. R. & Corp. Rep. 22, 49 Am. St. 582, 9 L. R. A. 689: stated, Brooks: 370; Jackson, 53 Oh. 303, 35 L. R. A. 287; Martin v. Richardson, 94 Ky. 183, 42 Am. St. 353, 19 L. R. A. 692, n.: cases; Mobile R. R., 94 Ala. 131, 17 L. R. A. 113, ext. n. (relief to less guilty party to a contract); Choteau, 114 Cal. 91, 55 Am. St. 63, n. (partnership for immoral purposes); Andrews, 74 Miss. 362, 60 Am. St. 509, n.; Fivaz v. Nicholls (1846), 2 C. B. 501 (52 E. C. L. R.), 69 R. R. 514, 3 Mews' E. C. L., Bro. Max. 730.

Courts were created to advance and maintain morality—not immorality. They were not created to enforce honor among thieves. What they were not created for, they have no jurisdiction of. Woodson v. Hopkins, 85 Miss. 171, 107 Am. St. 275-290: cases.

Partner in charge and superintending the firm's business cannot buy out absent partner without making full disclosures. Brooks; Patrick.

Concealment by partner buying absent partner's interests will vitiate purchase. Brooks; Patrick; *Keech.* Tendency to illegality is sufficient to vitiate. Bish. Conts. 476.

Accounting between parties to illegal transactions; when allowed. Gr. Pub. Pol. 102-107, Kerr on Fraud, 377-379, 388 (a *particeps criminis* may sometimes re-

Leading Cases.—370. Brooks.

cover); Bish. Conts. 489. See *In pari delicto*, etc.; Whitworth.

Accounting by illegal partnership. Central, Co., 112 Ky. 606, 99 Am. St. 317-329, ext. n. (breeding and training race horses for purses is legal).

Agent of trustee cannot defend under In pari delicto, etc. Whart. Ag. 25, 250, 1 Whart. Conts. 357, Smith, Conts. 251; *Keech;* Floyd, 72 Tex. 202, 13 Am. St. 787, n. *Qui facit per alium facit*, etc.

Agent cannot set up illegality of transaction to hold money of principal.

Hardy, 63 Kan. 8, 64 Am. St. 969, 88 Am. St. 223. See Keech. S. P. as in Brooks; Tracy; Holman; Reynell v. Sprye, 1 De G. M. & G, 660-679, 42 Eng. Rep. 710; stated, 17 L. R. A. 113; Waters: 110 N. C. 338, 16 L. R. A. 834, n.

Fraud. *Ex dolo malo non oritur actio* (no cause of action arises out of fraud) does not apply when a case can be made out independently of fraud. De Leon, 49 Tex. 88, 30 Am. Rep. 101, ext. n.; Buck, 26 Vt. 184, 62 Am. Dec. 464, n.; Evans, 24 Pa. 62, 62 Am. Dec. 359, Whart. Ag. 25, 250; Holman, Hall; *In jure non remota;* Woodson, *supra.*

Money had and received will lie for money fraudulently drawn by means of a lottery ticket. Catts v. Phalen (1844), 2 How., 376; Bigl. Fraud, 170; Martin, *supra* (contracts arising out of illegality enforceable).

Holder of a lottery ticket may recover the prize from one who fraudulently got possession of it and its proceeds. Martin v. Richardson, *supra;* cited, Catts; *Armstrong.*

Bailments upon illegal contracts; recovery when permissible. 2 Kent, 587; Hall.

Non-delivery of telegram; because relating to illegal deals, is no defense. Gray, 87 Ga. 350, 27 Am. St. 529, 14 L. R. A. 85, n.

371. DIGGLE v. HIGGS (1877), 2 L. R. Exch. Div. 422, 6 Rul. Cas. 477-492, ext. n.; Gr. Pub. Pol. 225, Smith, Conts. 270. Whart. 451, Hughes, 3 Mews' E. C. L. Cited, Taylor v. Bowers; Bernard v. Taylor, *post* (excellent cases).

Cited, §§ 154, 156, 297, 345, Hughes' Proc.

Diggle stated: Wagers. A party to a wager may demand and recover his money from the stakeholder at any time before he has paid it over. Until it is paid they are not *in pari delicto.*

Bunn; 2 Beach, Conts. 1429; Deaver, 29 Neb. 812, 26 Am. St. 415, n.; *Bernard v. Taylor* (1893), 23 Or. 416, 37 Am. St. 693, 695, n.: cases, 18 L. R. A. 859; Ham. Conts. 215, 258, Huff. & W. Conts. 407 (stating *Taylor v. Bowers, post,* and the general rule); Stacy, 19 Me. 335, 36 Am. Dec. 755-757, n.; Bledsoe, 6 Rich. Law (S. C.), 44, 57 Am. Dec. 777, 778, n.; Wilkinson, 16 Minn. 299, 10 Am. Rep. 138-144. *Rule discussed.* Gr. Pub. Pol. 84, Ans. Conts. 200-203: cases; Hampden v. Walsh (1876), L. R. 1 Q. B. Div. 189; Mews' E. C. L.: stated, Ans. Conts., 201-203; Harper, 85 Ky. 160, 7 Am. St. 583; Taylor v. Chester, L. R. 4 Q. B. 309-315, 38 L. J. Q. B. 225, 6 Rul. Cas. 477-492, n.; Huff. & W. Conts. 407, 2 Chit. Conts.

Leading Cases.—371. Diggle.

976; Grover v. Zook, — Wash. —, 64 Cent. L. J. 451-458, ext. n. (marriage contract with a diseased person).

S. P. as in Diggle. As to a stake of two horses upon the event of a race to be trotted by them. Coombs, L. R. 1 Exch. 248, 4 H. & C. 375, Mews' E. C. L.

Parties must not only be in delictum but in pari delicto, in equal degrees of delictum, in equal fault. Hess, 77 Mich. 598, 18 Am. St. 421, n.; 6 L. R. A. 498, n.; Clark, etc., 77 Ga. 606, 4 Am. St. 98, n. (money deposited with agent for gambling is recoverable); Tyler, 79 Me. 210, 1 Am. St. 301 (money loaned for gambling but not used may be recovered); Adams, Eq. 175; Manchester R. R., 66 N. H. 100, 9 L. R. A. 689: cases, 49 Am. St. 582, 20 Atl. 383, 3 Am. R. R. & Corp. Rep. 22, 3 Cook, Corp. 893, 894; 2 Beach, Conts. 1779: cases; 1 Sto. Eq. 300, 2 Pom. Eq. 942; Harper, 85 Ky. 160, 7 Am St. 583, n.; Carll, 148 Mass. 32, 12 Am. St. 515, 1 L. R. A. 618 (fraudulent conveyance); 1 Beach, Mod. Eq. 80, Adams' Eq. 175; Stark, 39 Kan. 100, 7 Am. St. 537, n. (undue influence inducing the contract.)

Executory contracts; exception. While the illegal purpose is executory, the right to withdraw is a duty; it is called locus pœnitentiæ.

Ans. Conts. 200: cases; Smith, Conts. 304, n.; *Taylor v. Bowers:* stated, 2 Mech. Sales, 999, 2 Benj. 787, Keener, Quasi Conts. 259, 117 Cal. 473, 59 Am. St. 215, And. Am. Law; *Bernard v. Taylor;* 2 Beach, Conts. 1429; Spring Co.; Bigl. Fraud, 170, 344; Symes, L. R. 9 Eq. 475; Mews' E. C. L.; Hastelow, 8 Barn. & Cress. 221 (15 E. C. L. R.); Mews' E. C. L.; Bone, 5 Hurl. & Nor. 925; Mews' E. C. L. 3 Add. Conts. 1412; Palyart v. Leckie (1817), 6 M. & S. 200; Mews' E. C. L.; 2 Pars. Conts. 627, 1 Pom. Eq. 403; Edgar E. C. L., 3 East 225; Mews' E. C. L.; Stacy, 19 Me. 335, 36 Am. Dec. 755-757; Smith v. Bickmore (1812), 4 Taunt. (Eng.) 474; Mews' E. C. L.; White, 22 Pick. 181: Whart. Conts., § 354, 2 Benj. Sales, 787, n., Adams' Eq. 175.

And this idea is in criminal law. No crime is committed until the act is done. 2 Best, Ev. 457. *Actus non facit reum nisi mens sit rea;* Cruikshank.

One may plead freedom from a contract into which he never should have entered. Bro. Max. 695. *Pactis privatorum jure publico non derogatur.* § 18, Hughes' Conts.

Moneys advanced for illegal purposes may be recovered. Wassermann, 117 Cal. 425, 59 Am. St. 209, n. A forbidden marriage may be avoided. Van Houten.

Marine insurance. If the conditions in a policy have been performed, there can be no return if contract was illegal, but otherwise if not performed. Upon formally renouncing and retiring from the contract, the premium may be recovered. Palyart, *supra:* stated, Tyrie v. Fletcher (1777), 2 Cowp. 666; Mews' E. C. L. Carter v. Boehm (concealment avoids marine insurance absolutely).

Relief from illegal contract. Duval, 124

Leading Cases.—371. Diggle.

N. Y. 126, Huff. & W., Conts. 402. *Pactis privatorum,* etc. Bro. Max. 695, 696; Reynell v. Sprye (1852), 8 Hare, 222, 1 De Gex, M. & G. 660, 678, 42 Eng. Rep., 710, Mews' E. C. L., 2 Chit. 976; Hughes' Conts.

372. MITCHEL (OR MITCHELL) v. REYNOLDS (1711), 1 P. Wms. 181, 1 Smith, Lead. Cas. 756-783, 8th ed., 1 *id.* 404-436, 11th ed., 24 Eng. Rep. 347; Eddy, Combinations, *q. v.,* 2 Kinkead Torts, 491, 2 Pars. Conts. 871, 874, Chit., Bish., Smith, 213, 218, 226, Whart. 430, 431, Clark, 448, Sto., Ham. 272, Hughes, U. S. v. Addyston, etc. Co. (1897), 175 U. S. 211, 54 U. S. App. 723, 86 Fed. 271, 29 C. C. A. 141, L. R. A. 122, 2 Benj. Sales, 806, 106 N. Y. 475, 2 Rand. Com. Pap. 507, Greenh. Pub. Pol., Sto., Eq., Bish., Pom., 2 Kent, 466, 517, 4 *id.* 130, 1 Beach, Injunc. 467, 468.

Mitchel stated: Contracts in restraint of trade. R., a baker, sold out his business to M., and agreed not to engage in it for five years. He violated this contract and M. sued and recovered £50. French v. Parker (1888), 16 R. I. 219, 27 Am. St. 933, n., 27 Cent. L. J. 527-531; Diamond Match Co. v. Roeber (1887), 106 N. Y. 473, 60 Am. Rep. 464, Huff. & W. Conts. 362; McCurry, 108 Ala. 451, 54 Am. St. 177, n., Bouv. Dict. 909-914. Richards, 87 Wis. 503, 10 Am. R. R. & Corp. Rep. 99-172, ext. n. (pools and trusts); Addyston Pipe & Steel Co. v. U. S. (1899), 175 U. S. 211; 2 Eddy Combinations, *q. v.; Hitchcock v. Coker* (1837), 1 Nev. & P. 796, 6 Adol. & El. 438 (33 E. C. L. R.); Mews' E. C. L.; Smith, Conts. 221; Eddy, Combinations, *q. v.,* French v. Parker, *supra,* 2 Benj. Sales, 810-812; 9 Cyc. 527; Kramer, 119 N. C. 1, 56 Am. St. 690, n.: Alger, 19 Pick. (Mass.) 61, 31 Am. Dec. 119; Smith, Conts. 226. § 158, Hughes' Proc.

Contracts in total restraint of trade illegal. Salus populi, etc. Greenh. Pub. Pol. 683-700 (excellent *resume* with valuable citation, cases reviewed and criticised); *Alger; Mallan.* See Holman: 363.

Contracts in restraint of trade. Greenh. Pub. Pol., pp. 683-770: cases (excellent *resume;* see *supra*); 2 Eddy, Combinations, 657-795; Wright, 36 Cal. 342, 95 Am. Dec. 186-193, n.: cases; cited, Ans. Conts. 188, 2 Pom. Eq. 934, 1 Add. Conts. 270, Herreshoff, 17 R. I. 3, 33 Am. St. 850, n., 8 L. R. A. 469 (may be co-extensive with state); Western Ass'n, 84 Mich. 76, 11 L. R. A. 503, n.

A contract in partial restraint of trade is upheld. Tuscaloosa Ice Co., 127 Ala. 110, 28 So. 669, 85 Am. St. 125, n., 50 L. R. A. 175; Union Strawboard, 193 Ill. 420, 86 Am. St. 346, n. (limitations as to time and place must be reasonable).

Contract limiting as to time and subject-matter void. Clark, 125 Mich. 84, 82 Am. St. 559, n.: cases.

Illegal trusts under anti trust laws. Whitwell, 125 Fed. 454, 64, L. R. A. 689-775; Straus, 177 N. Y. 473; Atlanta, 127 Fed.

Leading Cases.—372. Mitchel.

23; Harding, 182 Ill. 551, 64 L. R. A. 738.

Unlawful combinations; Standard Oil: 118 Ky. 662, 111 Am. St. 331, n.

The old common-law doctrine was, that a contract imposing any restraint of trade was contrary to public policy and void. Gradually, however, it came to be recognized that in some circumstances a restriction to protect the purchaser of a business and its good will, or to protect partners in a business, or to protect trade secrets, worked to the benefit of the public and the individual alike by promoting the easy, untrammeled transfer of property in accord with the policy of the law, and by allowing a party to dispose of the fruits of his industry more advantageously. Hence arose the doctrine announced in *Mitchel,* that a contract which imposed only a partial restraint of trade and proceeded upon an adequate consideration was valid. The phrase "adequacy of consideration" will be found to mean the same thing as reasonableness (Mallan; Pilkington v. Scott, 15 M. & W. 657).

After a series of carefully considered cases, a further modification has been established by the courts of England, and the present doctrine there tends to disregard the distinction between general and partial restraints, and to make the inquiry turn upon whether the restraint is reasonable and no wider than is necessary to protect the covenanter. A notable recent case on the subject is *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1894), 63 L. J. Ch. 908; A. C. 535, 6 Rul. Cas. 413, Mews' E. C. L. 191, 192. Followed in Underwood, L. R. 1 Ch. Div. 300.

The prevailing doctrine of the federal courts and of most of the state courts in the United States is substantially in accord with that which obtains in England (U. S.), 166 U. S. 290; Harrison, 116 Fed. Rep. 304; Oliver, 52 Fed. Rep. 562; Carter, 43 Fed. Rep. 208; U. S. v. Addyston, 85 Fed. Rep. 271; Diamond Match Co., *supra;* Anchor Electric Co. v. Howkes, 171 Mass. 101; Richards, *supra.* Eddy on Combinations, citing these cases.

Some of the state courts, however, adhere to the old common-law doctrine, and decline to enforce a restrictive covenant which embraces the whole of the U. S. or even the entire state. Union Strawboard Co.; Lufkin Rule Co., 57 Ohio, 596.

The scope of the limitation of the doctrine permitting contracts in restraint of trade to be enforced. The very statement of the rule governing contracts in restraint of trade shows that it applies only to those covenants of restraint which are merely auxiliary to the main purpose of a lawful contract. It is such main purpose that supplies the measure of protection needed. An independent contract in restraint of trade is not sustainable under the above rule (U. S. v. Addyston Pipe, *supra;* Nes-

Leading Cases.—372. Mitchel.

ter, 161 Pa. 473; S. C., 24 L. R. A. 247; Tuscaloosa Ice Mfg. Co. v. Williams, *supra*).

Covenants in unreasonable restraint of trade are void in the sense that the courts refuse to enforce them. They are not immoral in the sense that it is unlawful to enter into them, but the parties must depend for their performance upon the good nature and *bona fides* of each other. The law attaches no obligation to either party to perform (Lyon, 36 Mich. 345; More v. Bennett, 41 Ill. App. 174; Live Stock Co., 143 Ill. 235; Fishell, 60 N. J. Law, 5; Burlington Co., 31 Fed. Rep. 652).

Whether a contract which contains a covenant in illegal restraint of trade is enforceable depends upon principles relating to divisible and entire contracts, and general rules governing remedies upon contracts. In applying these principles and rules it is essential to consider whether the contract is unilateral or bilateral; whether it is the promisee or the promisor who is in alleged default, that is, who is the party plaintiff (1 Pars. Conts., 8th ed., 474, Ans. Conts., Huffcutt's ed., 1895, pp. 253, 255; Higgins, 65 Ark. 604, 15 Am. & Eng. Encyc. Law, 2d ed., 990, 991: cases).

It has been declared that when a contract contains a covenant which is unreasonably in restraint of trade the illegal covenant will be disregarded and the contract enforced as if no such covenant had been included. Rosenbaum, 65 N. J. Law 266; Fishell, *supra*. The announcement of this proposition was not necessary to the decision of either of these cases, and it is difficult as a matter of principle to find support for it. It is a matter of common knowledge that persons frequently enter into contracts with a well defined and understood purpose to secure the performance of acts or the attainment of objects which are illegal because against public policy or *contra bonos mores* (Lyon *supra;* Live Stock Co., *supra;* More, *supra*). For the court to strike out such a stipulation in a contract on the ground that it forms no part of the consideration would be to make a new and different contract for the parties in violation of well established principles of contract construction. Cutter: 308: cases.

Prior to 1870 it was generally held that prohibiting business within a state was void, but this rule was then relaxed. Ans. Conts. 188. *Good will.* 12 Rul. Cas. 442-463; 14 Am. Law Reg. 1-11.

Contracts may be valid in part and void in part. Pigot's Case.

Corporations cannot suspend the functions for which they are created by contract. Central Co. v. Pullman, 139 U. S. 24, 4 Am. R. R. & Corp. Rep. 172.

Monopoly; combinations; pools. S. v. Nebraska, etc. Co.; Gr. Pub. Pol. 642-683; Nester, 161 Pa. 473, n., 2 Benj. Sales, 799; Trenton Potteries, 58 N. J. Eq. 507, 78 Am. St. 612, n.

Leading Cases.—372. Mitchel.

Monopoly; contract in restraint of trade to create, is void. Santa Clara, 75 Cal. 887, 9 Am. St. 211, n. Injunctions to enforce contracts in restraint of trade. 1 Beach, Eq. 461-473. Combinations in trade when unlawful. Brown, 111 Ga. 429, 90 Am. St. 126: cases.

Sale of hotel to competitor to give the latter all the custom is void. Clemons v. Meadows, —Ky.—, 6 L. R. A. N. S. 847: cases.

Contracts in restraint of trade must be upon a sufficient consideration, although under seal. Ans. Conts. 188; Hitchcock v. Coker, *supra, sub,* Cumber; Mallan.

Limitation as to place is essential to validity of. Gamewell Co., 160 Mass. 50, 39 Am. St. 458-465, n., 10 Am. R. R. & Corp. Rep. 78-98, 22 L. R. A. 673, n.; 1 Beach, Inj. 464.

Retiring partner, having sold the good will of the business may re-enter business, but cannot solicit the former customers of the abandoned firm to trade with him. Trego (1896), A. C. 7, 73, 12 Rul. Cas. 442-463, n.

373. MALLAN v. MAY (1843), 11 M. & W. 653, 13 *id.* 511, 63 R. R. 708, 5 Rul. Cas. 376-492, ext. n., 67 R. R. 707; Mews' E. C. L., Benj. Sales, 814, Ans. Conts. 188, Pars., Ham., Bish., Chit., Beach, Whart. 430-433, 632, 638, 672, Sto., Clark, Hughes, Jones, Construct., Gr. Pub. Pol. 21, *q. v.*, Suth. Stat. 792, Bro. Max. 552, 741, 1 Kent. 462, 2 Kent, 466, 3 Kent, 260, 9 Cyc. 565; *French v. Parker,* 16 R. I. 219, 27 Am. St. 733, n., 10 Am. R. R. & Corp. Rep. 168, 2 Whart. Ev. 924, 1 Beach, Inj. 467. Cited, §§ 147, 236.

Mallan stated: M. covenants: 1. Not to carry on the business of surgeon-dentist in London. 2. Nor in any place where the covenantess may have practiced. The former portion, being reasonable, will be enforced.

A contract may be valid in part and void in part, Wharf. Conts. 233, 337-338*a;* 2 Smith Corp. 737: cases; Corcoran, 138 Ill. 390; *This rule also applies to statutes.* Spraigue: 236; *Ut res magis valeat quam pereat.* 1 Chit. Conts. 67; 2 *id.* 972: cases; Bro. Max. 741: cases; Ans. Conts. 189; Tatum: 25 Ark. 209, 94 Am. Dec. 717, n., 10 Am. R. R. & Corp. Rep. 168, 2 Benj. Sales, 789; Texas Co., 83 Tex. 650, 15 L. R. A. 598, n. *Utile per inutile non vitiatur* (instructive illustrations).

Words are to be construed in an ordinary and popular sense unless it is obviously a word of art or is used in a different sense in some specified place, trade or business.

Mallan, 13 M. & W. 511, Bro. Max. 552, Suth. Stat. 250; 1 Chit. Conts. 29; Ans. Conts. 252, 1 Kent, 462; Cholmondeley v. Clinton (1817), 2 Merivale, 171-362, 35 Eng. Rep. 905, 2 Jac. & W. 1-201, 22 R. R. 83, 14 Rul. Cas. 578-638, n., 37 Eng. Rep. 527, Mews' E. C. L., *q. v.;* P. v. Mosher, 163 N. Y. 32, 79 Am. St. 552 (constitutions are construed likewise).

A consideration is necessary to support a contract in restraint of trade, although the contract is under seal. Cumber; 46

Leading Cases.—373. Mallan.

L. R. A. 130, stating Mallan; Smith, Conts. 226; Mitchel.

Ut res magis valeat quam pereat applied in Mallan v. May. Pigot's Case; 70 L. R. A. 933; Boydell.

Entire contract, if void in part is void in toto. Armstrong v. Toler, 11 Wheat. 258; cited, 1 Chit. Conts. 973: cases; Douthart, 197 Ill. 349, 90 Am. St. 167: cases, n.; Corcoran v. Lehigh Co., *supra;* Whart. Conts. 233, 337-338*a;* Crawford, 8 Johns. 253, 1 Chit. Conts. 68; Hinds, 6 N. H. 225; Donallen, 6 Dana (Ky.), 89, 91; Woodruff, 11 Vt. 592, 34 Am. Dec. 712; Walker, 8 Foster (N. H.), 138, 61 Am. Dec. 605; Rand, 11 Cush. 1, 59 Am. Dec. 131.

374. CHANDELOR v. LOPUS (1605), 2 Croke, 4, 1 Smith, L. C. 299-368, n., 54-65, 11th ed., 15 Mor. Min. Rep. 70, Hecker, Cas. Warranty, 40 Schuchardt v. Allen, 1 Pars. Conts. 600, 603, 1 Chit. 639, Beach, 1439, Whart. 244: cases, Sto., Hughes' Conts., Huff. & Wood, Am. Cas., 2 Mech. Sales, 1334, Adams, Cas., Williston, Cas. 606; *Wolcott v. Mount* (1873), 36 N. J. Law, 262, 13 Am. Rep. 438, 70 L. R. A. 654, 2 Add. Torts, 1184, 625, Bro. Max. 781-797, Bisph. Eq. 198, 207, 2 Kent, 490; 1 Wall. 359-371; C. v. L., §§ 13, 15, 22, 147, 150, 186*a*, Hughes' Proc.; cited, §§ 8, 289*a*, 296, Gr. & Rud.

Chandelor stated: C., a jeweler, sold L., a customer, a stone, representing it as a bezoar stone, when it was not. *Held,* C. was not liable in contract, because his assertion did not amount to a warranty (*Simplex commendatio non obligat*); nor in tort, because he might have believed what he said. Pasley.

Chandelor has been much questioned. Indeed, the law now seems to be that "every affirmation at the time of the sale of a personal chattel is a warranty, if it appears to have been intended as such." C., being a jeweler, would probably be held to have known the quality of the stone. The test to determine intention is, did he assume to assert a fact of which the buyer was ignorant? If he did, he warranted. A picture dealer gave the following bill of parcels: *"Four pictures, views in Venice, Canaletto,* 1601." It was held that the jury might very well find that the words imported *a warranty that Canaletto had painted the pictures.* Power, 4 Adol. & El. 473 (31 E. C. L. R.), 6 N. & M. 62; Mews' E. C. L.

Words descriptive of a thing are a warranty that the goods are of that description. Pope, 115 U. S. 363, Huff. & W. Conts. 595; *Verba generalia,* etc.; *Chanter v. Hopkins,* 4 Mees. & W. 399; 12 Mews' E. C. L.; Thomas (drug case).

What shall be said of a treatise on the law of fraud which makes no mention of Chandelor? We find this excuse offered: that "the truth is, this case is taken as an illustration of a class that has had its day." Preface Bigelow on Fraud. Parsons, Contracts, cites Chandelor and wholly omits Pasley. These two cases and

Leading Cases.—374. Chandelor.

R. v. Wheatley, and the maxims *Caveat emptor* and *Simplex commendatio,* are apt citations in contracts, torts, fraud, sales, as well as in many other relations. Each holds a place in legal literature and commands its pages peculiarly and singularly. They specifically relate to no one title or topic head—they belong to all. The law is an entirety, a whole, and is indivisible —non-partitionable. Preface Bish. New Crim. Law, 8th ed. Mr. Bigelow ought not to omit Chandelor, nor Parsons Pasley. They are technics—they lead the way—they have no equivalents. Their denials and modifications are easily noted and made prominent, and these facts are the things wanted. It is the history and bibliography of each question that is needed. Likewise the use of Kingston's Case is well justified. See notes to J'Anson: 91; Dovaston: 217. The fact is, one intellect embraces these cases, while another denounces them. Thus the law is written.

If earlier law is wrong, and Chandelor misled and caused it, then that is the thing to know, and is also that which enables us to be exact, aad to make definite and precise mention. As to this all must agree; and looking from the bibliography of Chandelor and noting that it is found in works longest and most widely cited, published and sold, found all around the globe, so that wherever it may be desired the authority, if only known, is accessible and tangible—is in nearly every library on earth,—then the advantage of such a case appears. For instruction and leading the way and giving the benefits of one's own library, it is like *Rees:* 343, *Cutter:* 308, *Cumber:* 311, *Kingston's Case:* 76, *Dovaston* and *R. v. Wheatley:* 19.

Representations and warranty. Whart. Conts. 212-231; Carter v. Boehm.

375. PASLEY v. FREEMAN (1789), 3 Term. Rep. (D. & E.), 51, 1 R. R. 634, 2 Smith, L. C. 75-106, 8th ed., 66-101, 11th ed., 2 Smith, Cas. Torts, 425, Bigl. L. C. Torts, 1-42, Hecker, Cas. Warranty, 12 Rul. Cas. 235-298: cases, Chit. Conts., Beach, Ham. 121, Smith, 246, Whart. 219, 261, Sto., Laws, 245, 1 Page 94, 13 Cyc. 13, 20 Cyc. 1-146, Hughes, 2 Kent, 489, Suth. Dam., Mech. Sales, Benj. S., Bro. Max. 193, 785, 60 Vt. 402, 6 Am. St. 123, Mews' E. C. L.; *Evans v. Bicknell* (1801), 6 Vesey, Jr. 174, 31 Eng. Rep. 998 (stating and discussing the case); *Lyon v. Briggs* (1883), 14 R. I. 222, 51 Am. Rep. 372, 4 L. R. A. 159, Reinh. Ag., Bigl. Fraud, 2 Kinkead, Torts, 718: cases, Cool., Bish., Moak, *Underh.,* Add., Bish. Eq., Pom., Adams, 2 Gr. Ev., Ewart, Estop 64, 222 (ablest *resume* of estoppel from misrepresentation), Bigl. Estop. See *Caveat emptor.*

Cited, pp. 18, 39; §§ 5, 13, 15, 22, 147, 150, 181, 186*a*, Hughes' Proc.; §§ 8, 44, 46, 295, 229*a*, 296, 313, Gr. & Rud.

Pasley stated: P., the plaintiff, dealt in cochineal. He was told by F., the defendant, that he knew Mr. Falch would purchase P.'s large stock on hand. P.

Leading Cases.—375. Pasley.

asked: "Is he a respectable and substantial person?" "Certainly he is," answered Freeman, who knew exactly the contrary. (Fitzsimmons.) On that representation P. let Falch have sixteen bags of cochineal, worth £3,000, on credit. Falch being insolvent, P. sued Freeman for his deceit which caused the injury. *Held*, Freeman was liable. 1 Wat. Tres. 318, Ans. Conts. 131, Leake, 188, Whart. Conts. 241, Bisph. Eq. 214. See DECEIT; *Caveat emptor.*

Statute of Frauds. Fourth section of, only applies to contracts, not to torts. The principle is, "that wherever deceit or falsehood is practiced to the detriment of another, there the law will give redress." Freeman's lack of interest was no defense for him. See Lord Tenderden's Act; Smith, Conts. 117; 2 Add. Torts, 1175.

He was liable for telling an untruth which injured another person. An action of deceit will lie for this. The injured party must have acted upon the representation to his injury.

Pasley, Ewart, Estop.: cases; Rogers, 57 Ill. 244; Taylor, 58 N. Y. 262; Branham, 42 Ind. 181; Bigl. Fraud, p. 85: cases, Huffc. Ag. 150; Taylor, 11 M. & W. 401-418, 63 R. R. 635.

Deceit which does not deceive is not fraud. Caveat emptor. There must be a truly wronged person, none other can complain. To illustrate: Inserting a metal plug in a cannon which one buys, carelessly or without inspection, is no fraud. Deceitfully misleading one by erroneous advice is actionable. Advising one deceitfully to his injury or into a trap is actionable, as where one is advised to assign his earnings to defraud his creditors and by this is injured.

Sub, Ashby: 273; Stark, 39 Kan. 100, 7 Am. St. 537; Horsefall, 1 H. & C. 90: cited, Ans. Conts. 161, Mews' E. C. L., *q. v.; Cottrill v. Krum* (1890), 100 Mo. 397, 18 Am. St. 549-563, ext. n., Page, 104, 9 Cyc. 430, Smith, Torts. 527, 82 Cal. 351, 16 Am. St. 137-178, n.; Dawe, 149 Mass. 188, 14 Am. St. 404, n., 4 L. R. A. 158, n; *Zabriskie. v. Smith* (1855), 13 N. Y. 322, 64 Am. Dec. 551-562, n.; Cameron, 86 Wis. 477, 22 L. R. A. 512, n.; Kountze, 147 N. Y. 124, 49 Am. St. 651, 29 L. R. A. 360; Dickson, 160 U. S. 584, 40 L. ed., 543, n.; Meeks, 93 Ala. 17, 11 L. R. A. 196, n.; Bullitt, 42 Minn. 8, 6 L. R. A. 149, n.; *Strathmore, sub,* MARRIAGE; Hedin v. Minneapolis, Inst., 62 Minn. 146, 54 Am. St. 628, n., 35 L. R. A. 417-442, ext. n. (expression of opinion as fraud), Stewart: 128 U. S. 383.

Effects of a misrepresentation. It is immaterial whether the facts were known to be false or not.

Snell v. Ins. Co. (1878), 98 U. S. 85, Ewart, Estop. 79, 2 Kinkead, Torts, 712-740: cases; Wilcox v. Iowa, etc. (1871), 32 Iowa, 367, Huff. & Wood, Am. Cas. Conts. 268. A contract induced by misrepresentation cannot be enforced. School Directors v. Boomhour (1876), 83 Ill. 271, Huff. & Wood, Am. Cas. Conts. 271. Misrepresentation of a material fact acted upon is ground for relief. Woodruff v. Saul (1883), 70 Ga. 271, Huff. & Wood, Am. Cas. Conts. 272; 2 Chit. Conts. 1039-1044; Howard v. Gould (1856), 28 Vt. 523, 67 Am. Dec. 728, 1 Page 108; Lawson: 38 Wash. 422, 107 Am. St. 880, n.

Contracts *uberrima fides* (of the severest faith) demand strict fidelity. Walden, 12 Iowa, 134, 32 Am. Dec. 116, Huff. & W. Conts. 273.

In insurance all material facts must be disclosed. Behn v. Burness; Phœnix Life Ins. Co., 120 U. S. 183, Huff. & W. Conts. 275; *Carter v. Boehm.*

Representations that estop. Horn v. Cole; *Stevens v. Ludlum* (1891), 46 Minn. 160, 24 Am. St. 210, 13 L. R. A. 270, Huff. & Wood, Am. Cas. Conts. 280; Ewart, Estop, citing *Pickard, Horn, Swan* and other cases; Huffc. Ag. 52, Ewart, Estop. 128; *Laidlaw v. Organ* (1817), 2 Wheat. 178, 4 L. ed. 214; Huff. & W. Cas. Conts. 282, Pars., Ans., Beach, Conts., Benj. Sales, Mech., 2 Kent, 484, 485, Sto. Eq., Bisph., Pom., Perry, Trusts. (The great American leading case.) Stewart, *supra.*

What is fraud. Hanson, 29 N. H. 343: cited, 2 Chit. Conts. 1039. It arises from a consideration of all the facts. *Id.*

It is an *in pari materia* consideration. 2 Chit. Conts. 1039; Farnam: 97.

Vendor must disclose material defects, when. Hughes, 1 Mon. (Ky.) 215, 15 Am. Dec. 104 (sale of a blind horse, not known by the buyer to be so); Dickson, 2 B. Mon. (Ky.) 374 (sale of an impotent jackass); Hart, 7 Mon. (Ky.) 381, 18 Am. Dec. 186 (sales of personal property); *Whitnorth v. Thomas.* Same rule in sale of real estate. Harris: 380.

Caveat emptor generally applies to execution, judicial and taxation sales. *Ignorantia legis neminem excusat.* The rationale of constructive notice justifies this rule. Deputron: 121. All are charged with violations of principles of due process of law, when this appears from the common-law record. Windsor: 1.

Essential features; fraud is a false representation. Laidlaw v. Organ, sub, Caveat emptor. Concealment of a latent defect, like that of cattle having fever when they are sold at a sound price. Grigsby, 94 Mo. 423, Huff. & W. Conts. 285.

Many cases hold the representations must be of fact. Fish v. Cleland; Ross, 35 Ala. 434, see CASES. Huff. & W. Conts. 201; Dawe, 149 Mass. 188, 14 Am. St. 404, 4 L. R. A. 158 (must be an existing fact and material); Sheldon, 85 Wis. 138.

Many cases hold the representation must be made with knowledge of its falsehood or without belief in its truth. See *Derry v. Peek, post; Allen v. Flood,* wherein Pasley is discussed; Chatham Furnace Co., 147 Mass. 403, 9 Am. St. 727, 298, 16 Mor. Min. Rep. 103; McKown v. Furguson (1878), 47 Iowa, 636; Hunnewell, 154 Mass. 286, 13 L. R. A. 733, Huff. & Wood, Am. Cas. Conts. 303, citing and approving Pasley.

Fraud or bad faith is not essential. Ewart, Estop. 83-97; see *Derry v. Peek* (1889), 14 A. C. 357, 12 Rul. Cas. 250-298 (there must be proof of fraud, and nothing short of this will suffice); cited, Ewart, Estop. 84, Mews' E. C. L., Cook, Corp. 157, 2 *id.* 335.

Leading Cases.—375. Pasley.

But the prevailing rule is that a reckless misrepresentation imposes liability.

Whart. Conts. 241; Leake, 188; §§ 97, 101, Hughes' Conts.; Squib Case.

The representation must actually deceive. Lewis, 151 Mass. 345, 21 Am. St. 454, Huff. & W. Conts. 306. This element is the same in equitable estoppel. Pickard; Horn; Page: 191.

The speaker is only responsible to the person he addressed. Henry, 95 Me. 24, 49 At. 58, 85 Am. St. 365-391, ext., n. See Thomas; Langridge.

Expressions of opinions as fraud. Hedin, 62 Minn. 146, 54 Am. St. 628, n., 35 L. R. A. 417-441, ext. n., 1 Page, 96-97.

Elements of misrepresentation. Ewart estoppel. *Jenkins v. Long; Chandelor;* Southern Development Co., 125 U. S. 247; Crocker, 164 Ill. 282, 56 Am. St. 196: note, stating Tuck v. Downing, *sub*, Harris v. Tyson; *Langridge v. Levy; Polhill v. Walter; Horn v. Cole; Pickard v. Sears; Collen v. Wright; Pasley v. Freeman;* Taylor v. Ashton; *Smith v. Marrable;* Moak, Torts, 551, Cool. Torts, 554-594, Kerr on Fraud, 94-100, 2 Add. Torts, 1174-1232.

Debauching a girl and inducing another to marry her, ignorant of the facts, is actionable. Kujek, 150 N. Y. 176, 34 L. R. A. 156, n., 55 Am. St. 670, n.; Fargo Gaslight Co., 4 N. Dak. 219, 37 L. R. A. 593-616. Allen v. Flood (illustrations).

Corporation directors; prospectus; representations of; action for deceit. Scott v. Dixon (1859), 7 Rul. Cas. 523, n.; Peek v. Gurney (1873), L. R. 6 H. L. Cas. 377, 7 Rul. Cas. 527, Cook, Corp., *q. v.*, Mews' E. C. L.; 1 Page Conts. 114; Keech; *Derry v. Peek* (1889), 14 App. Cas. 337, 12 Rul. Cas. 250-298, n., Mews' E. C. L., *q. v.*; Cook, Corp., *q. v.*; Finch, Cas. 522; Smith, Torts, 456; 1 Page Conts. 56, 108.

Asserted knowledge; when evidence of intent to deceive. Chatham Furnace Co.; Moak, Torts, 550-553: cases; *Swentzel v. Bank* (1895), 147 Pa. 140, 5 Am. R. R. & Corp. Rep. 645-668, ext. n., 30 Am. St. 718 n., 15 L. R. A. 305-317, n., 2 Cook, Corp. 702, 1 Kinkead, Torts, 135; Houston, 122 N. C. 365, 65 Am. St. 699, n., Cook, Stockh. 701-703 (bank directors liable for representing insolvent bank solvent); Gomer, 58 N. B. 135, 46 L. R. A. 244, n. (liability of bank directors); *Polhill v. Walter;* Crane, 48 Kans. 259, 15 L. R. A. 795: cases, n. *Right to rely on published statements of banks.* Hindman, 98 Fed. 562, 48 L. R. A. 210, n. Cook, Corp., *q. v. Inducing purchase of corporate stock.* Hindman, 50 C. C. A. 623, 112 Fed. 931, 57 L. R. A. 108, Cook, Corp., *q. v.*

Marriage induced by pretense of being unmarried is actionable. Morrill, 68 Vt. 1, 33 L. R. A. 411, n.

Certificate of architect as to work and materials, if erroneous, is actionable. Corey, 166 Mass. 279, 55 Am. St. 401, n.

Pleading and proving scienter; it must be alleged and proved. Griswold, 126 Pa. 353, 12 Am. St. 878, n.; *Cf.* Tyler, 111 Ky. 191, 54 L. R. A. 418; 1 Chit. Pl. 137; Shippen, 122 U. S. 576. See Squib Case.

Silence or failure to state facts as constituting fraud. Chicora, 91 Md. 144, 50 L. R. A. 401, n.

False representations, generally. Jenkins v. Long; Fitzsimmons v. Joslin; 3 Suth. Dam. 1163-1180; Moak, Torts, 519-563; 2 Sedgk. Dam. 439-442; 8 Encyc. Pl. & Pr. 884-913; *R. v. Wheatley;* 12 Rul. Cas. 235-298; Tuck, *sub*, Harris: 380; Crocker, *supra.*

Important rule. Deceit; fraudulent representations; elements of. If A. fraudulently makes a representation which is false, and which he knows to be false to B., meaning that B. shall act upon it, and B., believing it to be true does act upon it, and thereby suffers damage, B. may maintain an action against A. for the deceit; and this is true although the representations were made to the public, and B.; an individual, was deceived thereby. Ewart, Estop. 69, 127, Cook, Corp.

Gerhard v. Bates (1853), 2 El. & Bl. 476 (75 E. C. L. R.), 20 L. & Eq. 129; Mews' E. C. L.; Whart. Neg.; Wood, Nuis.; 1 Add. Torts, 12, 49; 2 *id.* 400; Kerr on Fraud, 54, 326; Bigl. Fr. 90; Bigl. Cas. Torts, 38, 39, Cool. Torts, 565, 585; Bauman, 51 Ill. 381; Peabody, 7 Allen, 56; Nounnan, 81 Cal. 1, 6 L. R. A. 219, n. *Deceit.* Bigl. Fraud, 1-92; Chandelor v. Lopus; Ewart, Estoppel (able *resume*).

Misrepresentations by officers of corporations. A., an officer of a corporation, by false representations held out to the public, induced B., an individual, to purchase stock. B. was damaged by such purchase because of the false representations of A. *Held,* that B. may recover from A. for the deceit. Gerhard, *supra.*

Cheats; false pretenses. R. v. Bryan; R. v. Wheatley. Promise made with no intention of keeping it. Page Conts. 102.

Marriage contracts; concealment of affliction with an incurable abscess is ground for a rescission. Willard v. Stone (1827), 7 Cow. 22, 17 Am. Dec. 499-498, n., Suth., Sedg., Dam.; Chit., Pars., Bish., Conts., Smith, Conts., Whart. 73, 253; 3 Encyc. Pl. & Prac. 683-694. And likewise of unchastity of the woman. Foster v. Hanchett (1896), 68 Vt. 319, 54 Am. St. 886, n. See Van Houten.

[*Important bibliographical observations. Pasley* is a great case and leads to volumes. We may pursue it through tables of cases, and if in the directions next noted we will find it at random in many books, *e. g.* 12 Me. 262, 28 Am. Dec. 177-178 (with *Chandelor*), and also in 10 Vt. 219, 33 Am. Dec. 219; 1 Met. 1, 35 Am. Dec. 339; 10 Ohio, 469, 36 Am. Dec. 106 (Paisley or Pasley); 4 Ala. 21, 37 Am. Dec. 735; 6 Met. 246, 39 Am. Dec. 731; 1 How. (Mass.) 328, 40 Am. Dec. 86; 9 Met. 83, 43 Am. Dec. 370 (*Chandelor*), 27 Me. 308, 46 Am. Dec. 602, 606; 1 Strobh. 220, 47 Am. Dec. 551, 553; 16 Ala. 785, 50 Am. Dec. 205 (Chandelor), 208, 608, etc. And this plan is the same in all series with tables of cases cited or with tables of citations, and accordingly we trace the question through any work or set of reports, and as in *Lyon v. Briggs* (1883) 14 R. I. 222, 51 Am. Rep. 372, 4 L. R. A. 159. And we may find it in volumes that are without tables of cases cited, *e. g., Cottrill,* citing *Pasley.*]

Leading Cases.—

376. JONES v. JUST (1868), L. R. 3 Q. B. 197, 9 B. & S. 141, Ans. Conts., Beach, Chit., Add., Ham. 93, 467, 468, Whart. 221-224, 905, Hughes, Williston, Sales, 631, 23 Rul. Cas. 466, 2 Mech. Sales, 2 Benj. 984, Bigl. Fraud, 2 Kent, 480; *McQuaid v. Ross*, 22 L. R. A. 197, 198, ext. n., 13 L. R. A. 494; 151 N. Y. 485, 37 L. R. A. 801; Rollins: — N. C. —, 68 L. R. A. 441-446; Kellogg: 110 U. S. 108-119; 1 Page Conts. 164, Mews' E. C. L., 165 Pa. 554, 44 Am. St. 674; Dushane, 120 U. S. 630, Suth. Dam. 675 (stating rule in Hadley); 7 S. C. Ct. R. 696, *sub*, Pasley (sale of rags infected with small-pox).

Jones stated: Caveat emptor; warranty. Jones & Co. bought of J. and paid him for several bales of Manilla hemp, yet to arrive from Singapore. When it arrived it was so damaged as to unfit it for the article desired or its ordinary uses; it was damaged 75%. For this damage J. was sued, although he had never seen it, and did not know its condition. *Held,* goods must not only correspond to the specified description, but must also be salable or merchantable under that description. Bierman, 151 N. Y. 482, 37 L. R. A. 799: cases; 70 L. R. A. 653-666.

Warranty; Caveat emptor; warranty of quality sometimes implied. *Caveat emptor* generally applies to the quality of goods sold, unless there is an express warranty. Chandelor; Hopkins; Morley; Pasley; 102 Am. St. 602-625, ext. n.

Implied warranty that thing sold is of the description specified. Frith Co., 133 Ala. 583, 91 Am. St. 54, n.; Plow Works, 90 Wis. 590, 603, 606 (citing Jones).

Merchantable quality is warranted. Murchie, 155 Mass. 60, 31 Am. St. 526, n., 14 L. R. A. 492; Bulwinkle, 27 S. C. 376, 13 Am. St. 645, n. (sale of corn means as if words were added "corn warranted sound"). Blackwood, 76 Cal. 212, 9 Am. St. 199, n.; Holloway: 120 Pa. 583, 6 Am. St. 737; Groetzinger, 165 Pa. 578, 44 Am. St. 676, n.

Common carriers; their liability for their vehicles. Ingalls. 353. Also, liverymen for vehicles and horses. *Id.;* Winterbottom.

Inspection of an article is no acceptance if it is to be of a certain description. Columbian, 84 Md. 44, 33 L. R. A. 103; Jordan: 324. See *Caveat emptor.*

377. MORLEY v. ATTENBOROUGH (1849), 3 Exch. 500, Williston, Sales, 624, 1 Pars. Conts. 592, 593, Chit., Whart. 230, Sto., Clark, 776, Hughes, Benj. Sales, 2 Add. Torts, 614, 2 Kent. 478, 479, Mews' E. C. L.

Sales; warranty; implied warranty of title. Jones, 2 Benj. Sales, 929-1012. See *Caveat emptor; Expressio eorum,* etc. Implied warranty on sale of corporate stock. McClure, 165 N. Y. 108, 53 L. R. A. 153, ext. n.

378. HOPKINS v. TANQUERAY (1854), 13 C. B. 130 (80 E. C. L. R.), 2 C. L. R. 842, 26 Eng. Law & Eq. 254, 1 Pars. Conts. 599, 1 Chit. 408, 646, 2 *id.* 630, Ham. 108, Sto. 1051, Hughes, 2 Mech. Sales, *q. v.,* 2 Benj. Sales, 929, 2 Add. Torts, 1183, Mews' E. C. L.

Leading Cases.—378. Hopkins.

Hopkins stated: Sale; warranty. Warranty must be during treaty of sale, or, if subsequent to sale, it must be upon a sufficient consideration. See Mills: 316. Hogins; Jones; Morley; *Caveat emptor.*

379. HOGINS v. PLYMTON (1831) 11 Pick. (Mass.) 97, Laws. L. C., Simp. 138, Ans. Conts. 300, 1 Pars. 602, 613, 1 Chit. 151, 633, 638, 641, 646, Sto., Clark, 671, Hughes; Bodwell, 66 Vt. 101, 6 Am. St. 162, 2 Mech. Sales, 2 Whart. Ev. 940, 942, 2 Benj. Sales, 931, 935, 967.

Hogins stated: H. bought of P. an invoice of wine and paid for it. P. delivered the wine and afterward made out and sent H. a memorandum describing it as "good, fine wine," but it was otherwise, and H. sued upon a warranty founded on a memorandum. *Held,* he could not recover. *Caveat emptor.*

Sales; warranty. Warranty must be during course of sale, else there is no consideration. Cady, 62 Mich. 157, 4 Am. St. 834; Cumber; Hopkins; *Lampleigh; Rann.*

Sale; contract in writing cannot be varied nor added to by oral evidence showing a warranty not in the writing. McCray, 99 Mich. 269, 41 Am. St. 599, n.. 4 Wigm. Ev. 2434; 1 Ell. Ev. 580; 17 Cyc. 596, 598. See ORAL EVIDENCE. *Parol (oral)* evidence of warranty outside of deed. Green, 71 Wis. 54, 5 Am. St. 194, ext. n.

Warranties not implied by law cannot be added by oral evidence. DeWitt, 134 U. S. 306 (an express warranty excludes all others). Seitz: 141 U. S. 510; Lower v. Hickman, —Ark.—, 64 Cent. L. J. 64: cases; (instructive case).

380. HARRIS v. TYSON (1855) 24 Pa. 347, 64 Am. Dec. 661, Blanch. Cas. Mines, 351. See note to Woollam, White & Tud. Lead. Eq. Cas., Cool. Torts, 558, Chit. Conts., Ham. Laws. 232, Whart., Clark, 326, 327, Page 157-162, Hughes, Conts., Bigl. Fraud, 33, Bisph. Eq. 213, 2 Pom. 903, 926, 928.

Harris stated: Grantor and grantee; Caveat emptor. This maxim applies in sales of real estate. Cleves; Smith; Pasley; *Simplex commendatio non obligat.*

One to whom representations are made, and who afterwards inspects land for himself, buys Caveat emptor. Farrar, 135 U. S. 609-621, Ans. Conts. 150: cases; 2 Add. Conts. 914, 1 Sug. Vend. 8, Bigl. Fr. 33; Williams, 24 Mich. 335; Crocker, 164 Ill. 282, 56 Am. St. 196, n., stating Southern Devel. Co., 125 U. S. 247; also, Shappirio, 192 U. S. 232, 241 (instructive case); Bro. Max. 773; Irvine, 7 Bell, Scotch App. 186, 3 Eng. L. & Eq. 17, 17 L. T. 32, 1 Pars. Conts. 578; Williams, 23 Fla. 143, 11 Am. St. 345, n.; Holst, 161 Mass. 516, 42 Am. St. 442 (as to railroad train service); Clark, 158 U. S. 505-531; *Tuck v. Downing* (1875), 76 Ill. 71, 8 Mor. Min. Rep. 83, Ans. Conts. 156; cited, Bigl. Fr. 14, 19, 64, 2 Pom. Eq. 879. Elements of misrepresentation. *Southern Development Co., supra. Buyer—vendee—is not bound to disclose what he knows.* Whart. Conts. 250. See CAVEAT EMPTOR.

Leading Cases.—

381. DUTTON v. GERRISH (1851), 6 Cush. 89, 55 Am. Dec. 45-49, n., Whart. Conts. 906, Hughes' Conts. Chit. Conts., 1 Pars. Conts. 612, 3 Suth. Dam. 848, Moak, Torts, 250, Thomp. Neg.; Davidson, 11 Colo. 585, 7 Am. St. 269, 1 Wash. R. P. 544, 3 Kent, 468, Tay. L. & T. 382, 383, 2 Wood, L. & T. 381, 2 Page Conts. 1225, § 143*a*, Hughes' Conts.

Landlord and tenant; implied covenants; Caveat emptor. Lease of a warehouse does not warrant its fitness for any use by implication. Dutton. A landlord only warrants title and that he will not disturb his tenant's possession. Cleves; Smith. See *Caveat emptor;* WARRANT; Bro. Max. 774.

Oral evidence inadmissible to alter or vary a writing. Dutton; Cleves; Pym: 53; Jones, Construc. Conts. 134. See ORAL EVIDENCE.

382. SMITH v. MARRABLE ("Bug Case") (1843), 11 Mees. & Wels. 5, 2 Dowl. N. S. 810, Car. & Marsh. 479 (41 E. C. L. R.), 9 Rul. Cas. 444, 12 M. & W. 78; 63 R. R. 493; 1 Pars. Conts. 611, 1 Chit. 514, 2 Add. 697, 771, Whart. 221, Sto., Hughes, 156 Mass. 348, 32 Am. St. 640, 16 L. R. A. 51, Mews' E. C. L.; Moak, Torts, 252; Murray, 50 N. J. Law, 167, 7 Am. St. 787, n., 3 Kent 464, 468, Busw. Pers. Inj. 82, 1 Wash. R. P. 544, 545, 1 Tay. L. & T. 66, 383, 1 Wood, L. & T. 47, 203, 365.

Smith stated: Lady M. rented furnished apartments of S., which were infested with bed bugs, discovered only after tenancy began, and resulting in notice from M. to S. of intention to vacate and of quitting the premises upon that ground. The apartments had been rented for five weeks, and S. sued for the entire period. (Cutter: 308.) M. defended, that letting furnished apartments carried by implication a warranty that they were fit for habitation, and if not so, that the tenant may quit without notice. *Held,* a perfect defense. Cleves.

Defective drainage (upon the principle in the "Bug Case") is ground for quitting. Wilson v. Finch Hatton (1877), 2 Ex. Div. 336, Moak, Eng. Rep. 488; Mews' E. C. L. 114, 115, Bro. Max. 776. *Eviction; what is.* Royce, 106 Mass. 201, 8 Am. Rep. 322.

Smith approved in Wilson v. Hatton, *supra;* Ingalls, 156 Mass. 348, 32 Am. St. 460, n.: cases, 16 L. R. A. 51, n.: stated, Franklin, 118 N. Y. 110, 6 L. R. A. 770; Cleves; Dutton (no warranty against external defects not caused by lessor); 9 Rul. Cas. 436; 16 Am. St. 744.

Caveat emptor generally applies to a tenant. Cleves. Except furnished apartments. Smith; Bro. Max. 774.

Landlord and tenant; Caveat emptor; warranty. There is an implied warranty in letting furnished rooms that they are fit for occupancy. Smith; *Caveat emptor.*

And lessor is liable for its breach, e. g., if a disease is communicated in. Cæsar v. Karutz, 60 N. Y. 229, 19 Am. Rep. 164; Busw. Pers. Inj. 84; Clifton, 40 W. Va. 207, 33 L. R. A. 449, ext. n. (implied covenant in a lease as to the fitness of property for the purpose intended). Finney: — Ala. —, 6 L. R. A. N. S. 977 (cites Cæsar).

Leading Cases.—382. Smith.

Master is liable for exposing his servant to disease. Kliegel, 94 Wis. 432, 35 L. R. A. 249.

383. CLEVES v. WILLOUGHBY (1845), 7 Hill. (N. Y.), 83, Ans. Conts. 201, Chit. 514, Sto. 1223, 118 N. Y. 112, 16 Am. St. 746; 3 Kent, 468, n., 1 Wash. R. P. 545, 1 Chit. Conts. 514, Jones, Construc. Conts. 139, Busw. Pers. Inj. 83. Cited, § 144, Hughes' Conts.

Landlord and tenant; warranty of premises; Caveat emptor. Condition of premises is not warranted by lessor.

Cleves; Collen; *Caveat emptor;* Todd. Nor that they are safe. *Caveat emptor* applies.

Doyle v. U. P. R. R. (1893), 147 U. S. 413, 37 L. ed. 225; *Hart v. Windsor* (1843), 12 Mees. & Wels. 68, 9 Rul. Cas. 438, 67 R. R. 266: stated, Smith v. Marrable, Bro. Max. 775, 118 N. Y. 111, 16 Am. Dec. 735; Franklin, *sub,* Smith (and reviewing the latter and Cleves); Dutton; Tay. L. & T. 382, Wood, L. & T. 379, Mumford, 6 Cow. 475, 16 Am. Dec. 440; Blake, 15 Mont. 336, 48 Am. St. 671, n. (limitations of covenants); Schmalzried, 97 Tenn. 36, 32 L. R. A. 782; Doyle, *supra;* Keates v. Cadogan (1871), 10 C. B. 591 (70 E. C. L. R.), 2 Eng. L. & Eq. 318, Mews' E. C. L.; cited, 87 Me. 150, 47 Am. St. 319, Ans. Conts. 155, 2 Wh. Ev. 1138, Moak, Torts, 248-257, Bro. Max. 776, 787, Wood, Nuis. 139, Tay. L. & T. 163, 2 Kent. 482, 3 *id.* 468, Sto. Eq. 198, 9 Rul. Cas. 453; Clifton, 40 W. Va. 207, 52 Am. St. 872, n. (*Caveat emptor* applies): Metzger, 16 Ind. Ap. 454, 59 Am. St. 323, n.; York, 21 Mont. 515; 43 L. R. A. 125. Belfour, 1 Term Rep. (D. & E.) 310, 1 R. R. 20, 9 Rul. Cas. 436 (tenant must pay, although premises are destroyed); Mews' E. C. L. 928 (Landlord and Tenant—Rent); Polack, *sub, Actus Dei,* etc.; Hallett.

Landlord liable to third person for premises let in a ruinous condition. Todd; Tarry; Shipley, 92 Am. St. 499-559, ext. n. (able *resume*). See Heaven; Langbridge.

Furnished apartments are warranted fit for occupancy. Smith; Cesar; Busw. Pers. Inj. Landlord is not bound to keep premises in repair. Ward, 101 Mo. 669, 10 L. R. A. 147, n., 20 Am. St. 650. Nor liable for freezing and bursting of water pipes. Buckley, 103 Ala. 449, 49 Am. St. 42, n.; not liable where there is no latent defect or concealment. *Id.*

Liability of landlord for injury to tenant from defect in premises. Hines v. Wilcox (1896), 96 Tenn. 148, 54 Am. St. 823, n.; 34 L. R. A. 824-834, ext. n., stating Dutton and Nelson v. Liverpool, etc., Co.; Sternberg, 93 Tenn. 163, 34 L. R. A. 615-619, ext. n.; Hamilton, 8 Ind. Ap. 485, n.; Wilcox, 100 Tenn. 524, 538, 66 Am. St. 761, 770, 41 L. R. A. 278; 92 Am. St. 217.

384. FITESIMMONS v. JOSLIN (1849), 21 Vt. 129, 52 Am. Dec. 46; Pars. Conts., Bish., Chit., Ham. 122, Whart., Sto. 214, 621, Hughes, Sto. Ag., Kerr on Fraud & Mis., Bigl., Benj. Sales, Bisph. Eq., Huffc., Tiff., Reinhardt, Cool. Torts, 560, 2d ed.,

Leading Cases.—384. Fitzsimmons.

3 Am. Law. Rev. 430. Cited, §§ 147, 148, Hughes' Proc.

Agency. Fraud of the agent is the fraud of the principal. Otte, 88 Minn. 423, 97 Am. St. 532 (rule most strictly applied). *Credit obtained by deceit is actionable.* Fitzsimmons; Childs, 63 Vt. 463, 14 L. R. A. 264, n.

Purchasing goods on credit, intending not to pay for them, will render one liable to an action of deceit. Swift, 19 R. I. 527, 33 L. R. A. 561, 61 Am. St. 791.

When the title passes, and when one may return consideration and rescind contract and sue in replevin. Sisson, 18 R. I. 212, 21 L. R. A. 206, n.

Sales of chattels induced by fraud are vitiated even as to bona fide purchasers. Donaldson, 93 U. S. 633, Ans. Conts., 156, n., 1 Benj. Sales; notes, 25 Am. Dec. 611-616; Fechheimer, 37 Fed. 167, 2 L. R. A. 153, n., Bish. Torts, 930, 2 Mech. Sales. See Root, 13 Wend. 570, 28 Am. Dec. 482; Lickbarrow: 394; Sturge, 2 Mylne & K. 195, 39 Eng. Rep. 918, Bigl. Fr. 187, 308, 2 L. R. A. 154, n.; *Allegans contraria,* etc.: Max. No. 16, Hughes' Proc.

A principal is bound by such representations of his agent as are part of the *res gestæ.* Wharf. Ag. 162.

One referring to another for information is bound by the communication of such person or referee. 1 Gr. Ev. 182, 2 Wharf. Ev. 1190, 1191; Pasley; Colorado Coal Co., 123 U. S. 309, 314; *Hamet v. Letcher,* 37 Ohio St. 356, 41 Am. Rep. 519, 15 Cent. L. J. 50, Cool. Torts, Bigl. Torts.

Innocent purchaser parting with a consideration is protected on the principle in Lickbarrow v. Mason. Bish. Conts. 673; Swift.

385. CORNFOOT v. FOWKE (1840), 6 M. & W. 358, Bro. Max. 793, Kerr on Fraud, 113, 1 Ans. Conts. 67, Pars., Chit., Add., Ham. 122, Wharf. 214, 290, Sto., Hughes, 1 Benj. Sales, 681, Mews' E. C. L., Bigl. Fraud, 367, Bigl. L. C. Torts, 29 Pom. Eq., Bisph., 2 Kent, 621, 1 Perry, Trusts, 172, Wharf. Ag., 2 Herm. Estop. 1201, Benj. Sales, *q. v.* Cited, § 147, Hughes' Proc.; § 303, Gr. & Rud.

Cornfoot stated: Agency; misrepresentations of agents; principal when liable for. F. rented of C. a furnished house adjoining a brothel, of which C. knew, but his agent, Clarke, a house agent, did not. This agent answered F.'s question, "Pray, sir, is there anything objectionable about the house?" with this reply: "Nothing whatever." Upon this assurance of the agent a written contract of lease was signed which did not set forth the agent's representation. The next day F., learning of the adjacent nuisance, immediately notified C. of his intention to abandon the contract. For this C. sued, and F. pleaded *fraud and specified that C., by fraud, covin and misrepresentation of C. and others in collusion with him,* procured the contract. The evidence did not sustain the plea of fraud as pleaded, and no such fraud appearing, none could be assumed, and therefore oral evidence was inadmissible to alter or vary the written contract. However, a jury found for F.,

Leading Cases.—385. Cornfoot.

the tenant, but their verdict was set aside on appeal and a new trial granted, Lord Abinger dissenting.

Had F. succeeded on his plea of conspiracy and fraud, then C., the innocent agent, would have been much affected thereby. F. should have pleaded deceit and misrepresentation of the landlord only. Then the written contract could have been attacked.

"The jury at the trial found a verdict for the defendant, which was set aside by the court of exchequer, solely upon the ground that the allegation of fraud by the plaintiff, upon which the defense proceeded, was not proved by the evidence. But if there had been no allegation of fraud in the case, and the lessee had relied not upon positive fraud in the plaintiff, but on a misrepresentation merely, it was not denied by the court but that the contract might have been avoided for that cause, and the principal would have been bound by the misrepresentation of his agent." Cornfoot; Sto. Ag., 139, n.; Huffc., Reinh. Tiff.

This case has sometimes been doubted, and sometimes sharply criticised. It might have been more clearly reported. When closely examined, it harmonizes with Fitzsimmons. Yet the contrary is stated. Kerr on Fraud, 113, 114.

Where an agent ignorantly makes a false statement, the principal knowing its falsity, cannot enforce the bargain obtained by such false statement. Wharf. Ag., § 167, quoting Cornfoot.

This case turned upon the pleading and proof. *Allegata et probata* must correspond.

The fraud of the agent is the fraud of the principal. Hedin, *sub,* Pasley; 35 L. R. A. 417, n.; Fairchild, 139 N. Y. 290, 36 Am. St. 701, n., Bigl. Fraud, 361-371, Bro. Max. 793; Moak, Torts, 553.

Agency; torts; liability of principal for representation of agent. See Collen; Lakeman; Thomson; *Respondeat superior;* Pickard.

The fraud of the agent is the fraud of the principal. Meehan, 52 N. Y. 277; Latham, 10 Grant (U. C.), Ch. Rep. 308; Barwick, L. R. 2 Ex. 259; 1 Mews' E. C. L.; Mackey; L. R. 5 P. C. 394, 9 Moak, Eng. Rep. 202; Mews' E. C. L.; Bigl. Fraud, 361-371; Fairchild, *supra;* Fifth Ave. Bank, 137 N. Y. 231, 33 Am. St. 712, n.; Haskell, 152 Mass. 117, 23 Am. St. 809, n., Moak, Torts, 553; Hedin, 62 Minn. 146, 54 Am. St. 628, 35 L. R. A. 417, ext. n.

They are joint trespassers. Moir, *sub,* Kirkwood.

Principal liable for agent's deceit of which principal takes advantage. Merchants' Bank; Hern v. Nichols (1709), 1 Salk. 289, Wharf. Ag., § 478; Huffc.; Ewart, Estoppel, 510 (ostensible agency).

Principal bound by agent's malicious or fraudulent torts, when ratified by himself, or expressly commanded. McManus; Wharf. Ag., § 477; Tome, 39 Md. 36, 17 Am. Rep. 530.

A principal is not liable for an independent, unauthorized tort by his agent,

Leading Cases.—385. Cornfoot.

wilfully committed by him, and not within the scope of the agency, nor expressly commanded by the principal. McManus; Craker; 1 Kinkead, Torts 67, 68, 71-73; Wilson; Gregory; Whart. Ag., § 479: cases, *e. g.*, where the agent makes an unauthorized arrest. Poulton; Schmidt v. R. R., 116 La. 311, 7 L. R. A. N. S. 162-175.

Misrepresentation must be relevant and material. Cornfoot; Pasley; Jenkins; Bish. Conts. 652; Horn.

386. HARRIS v. BROOKS (1828), 21 Pick. 195, 32 Am. Dec. 254, 2 Am. Lead. Cas. 425-482, Rand. Com. Paper, Danl. Nego. Insts., Pars. N. & B., 2 Suth. Dam., Brandt, Sur., 3 Kent, 123; Ewart, Estop. 70. Cited, § 147, Hughes' Proc.

Creditor deceiving a surety to his injury releases him. Carpenter, 9 Met. 511, 43 Am. Dec. 405, 2 Am. Lead. Cas. 427-482, Rand. Com. Paper, Pars. N. (surety surrendering security upon assurance of creditor that he is paid, is released); *Stone v. Compton* (1838), 5 Bing. N. C. 142 (35 E. C. L. R.), 6 Scott, 346, 3 Add. Conts. 1135, 63 Am. St. 328, Rand. Com. Paper, Pars. N., 2 Brandt, Sur., Pars., Chit.

Fraud and deception will discharge a surety. Fassnacht, 18 Ind. Ap. 80, 63 Am. St. 322-338, ext. n., 2 Brandt, Surety, 401-425; Page, 137 N. Y. 307, 21 L. R. A. 409-416, ext. n. (fraud of surety or obligee).

387. FIELD v. HOLLAND (1810), 6 Cranch (U. S.), 8, 3 L. ed. 136, 1 Am. L. C. 334-363, n.; Chit. Conts., Whart., Laws. 415, 3 Page, 1403, Clark, 637, Hughes' Conts., Beach, Ham. 434; 112 N. Y. 552, 8 Am. St. 784, Benj. Sales, 2 Gr. Ev. 533, Suth. Dam., 3 Rand. Com. Paper, 1502.

Field stated: Application of payments. Money is to be applied as the debtor directs; if he does not direct, then as the creditor elects; and if neither elect, then the law will apply it according to equity.

Mayor, etc. v. Patten; Arnold v. Poole; *Quicquid solvitur, solvitur secundum modum solventis*, etc.; 2 Gr. Ev. 529-536; Devaynes, 1 Mer. 530-611, 15 R. R. 151-169, 3 Eng. Rul. Cas. 329, n.; Mews' E. C. L., *q. v.*; Baum, 42 S. C. 104, 46 Am. St. 697, n. Application of payments cannot be to illegal claims. Note, 65 Am. Dec. 190; Bro. Max. 815.

Application of payments generally. 2 Benj. Sales, 1101-1114; 12 S. & R. (Pa.) 301, 14 Am. Dec. 691-695, n., Suth. Dam., Jones, Mort., Chit. Conts., 5 Am. Law Reg. (N. S.) 193-201, 257-265, 21 Cent. L. J. 473, 54 L. Mag. 21, same art., 3 Liv. L. Mag. 739; 1 Sto. Eq. 459*a*-462; Perot, 17 Colo. 80, 31 Am. St. 258, n.; Orleans, 112 N. Y. 543, 8 Am. St. 775, n., 3 L. R. A. 302.

Creditors may apply if debtors fail to direct. Blake, 83 Me. 129, 23 Am. St. 762, n., 12 L. R. A. 712; Phillips (1890), 78 Tex. 378, 22 Am. St. 59, n.; Frazier, 71 Md. 131, 17 Am. St. 516, n., 1 Beach, Conts. 390; Kotch, 150 Ill. 212; stated, 1 Beach, Conts. 398.

Leading Cases.—387. Field.

Mayor Alexandria, etc., v. Patten (1801), 4 Cranch, 317, 1 Am. L. C. 330-363, ext. n., 2 Dani. Nego. Insts. 1252, Pars. N. Chit. Conts., 2 Gr. Ev. 529-532, Benj. Sales, 1 Beach, Conts. 397; McWhorter, 136 Ala. 568, 96 Am. St. 43-82, ext. n.; *Arnold v. Poole* (1842), 4 Man. & Gr. 860 (43 E. C. L. R.), 2 Scott's N. R. 741, 2 Dow N. S. 574, 61 R. R. 664, Mews' E. C. L., Smith, Conts. 370, cited, 1 Rand. Com. Paper, 74, 327, 1 Pars. N. 163, Pars. Conts., Chit.

Application of payments. Field; Mayor, etc.; *Quicquid solvitur*, etc.

Corporations. Corporations must contract under seal. This was the former rule. Bank of Columbia, *sub*, Hill v. Boston, 3 Page, 1412.

388. WELBORN v. WEAVER (1855), 17 Ga. 267, 63 Am. Dec. 235, Whart. Conts. 677, Hughes' Conts., Mech. Ag. 240, 1 Dev. Deeds, 292. § 32, Hughes' Conts.

Acceptance of a deed is essential to consummate a realty contract. Brown, 47 Neb. 399, 53 Am. St. 532-556, ext. n.; Morris, 178 Ill. 9, 69 Am. St. 282.

And is essential to transfer title; requisites. Cravens, 116 Mo. 338, 38 Am. St. 606, n.; Lee, 46 Minn. 49, 12 L. R. A. 171, ext. n.; Stokes, 118 Ind. 533, 4 L. R. A. 313, n.; Wilson, 158 Ill. 567, 49 Am. St. 176; Wilson, 140 Ind. 533, 49 Am. St. 213 (may take effect at death of grantor).

Delivery of deeds; what amounts to. Tompkins, 16 Pet. 106, Add. Conts.; Parrott, 159 Mass. 594, 38 Am. St. 465, n., 22 L. R. A. 153, 1 Dev. Deeds, 260-311, 3 Wash. R. P. 286-303; Martin, 13 Mont. 96, 19 L. R. A. 242, n., 40 Am. St. 415; Clavering (1704), 2 Vern. 473, Prec. Chan. 235, Eq. Cas. Abr. 24, pl. 6, Brown, P. C. 122, 23 Eng. Rep. 904, 8 Rul. Cas. 576-622, n., Mews' E. C. L.; Doe d. Garnons v. Knight (1826), 5 Barn. & C. 671 (12 E. C. L. R.), 8 Dow. & Ry. 348, 8 Rul. Cas. 580, n., Mass. E. C. L.; Bowker v. Burdekin (1856), 11 M. & W. 128, 8 Rul. Cas. 599 (escrow; delivery upon condition), Mews' E. C. L.

Recording a deed by grantor is no acceptance by grantee. Parmelee, 5 Wall. 81; Smith, 116 Wis. 570. When beneficial acceptance is presumed with communication with grantee. 1 Whart. Conts. 23.

Delivery obtained by fraud is unavailing to pass title. Westlake, 184 Mass. 260 (strict case). *Delivery and acceptance of deeds.* 2 Whart. Conts. 677-691; Munro, 187 Ill. 346, 54 L. R. A. 864-910, ext. n.; Brady, 197 Ill. 291, 264, 90 Am. St. 161, n. *Delivery presumed to have been made at date.* Purdy, 109 N. Y. 448, 4 Am. St. 491, n. Delivery in escrow. 1 Dev. Deeds, 812-888.

Commercial paper; acceptance of. Coolidge: COMMERCIAL PAPER. *Sales.* See CONTRACTS; Tarling: 404. Contracts by letter. Adams. Contracts under seal. Ellis; Bish. Conts. 103-139; Jackson; Worrall. *Official bonds; delivery of, essential.* Paxton v. S. (1899), 59 Neb. 460, 80 Am. St. 689, n.

Leading Cases.—

389. ELLIS v. ESSON (1880), 50 Wis. 138, 36 Am. Rep. 830-840, 2 Smith, Cas. Torts, 712: stated, 11 Am. St. 908: cited. Cool. Torts, 161, Whart. Conts. 1036, Suth. Dam.; Seither, 125 Pa. 397; 11 Am. St. 905-909, n. Cited, §§ 256, 305, Hughes' Proc.

Trespass; joint trespassers; sealed instruments. Release, under seal, of one joint trespasser is a release of all, regardless of the intention of the parties. This results by reason of a technical rule of construction. A seal imports a consideration conclusively. *Bronson v. Fitzhugh* (1811), 1 Hill, 185, Cool. Torts, 161, 1 Beach, Conts.. 453, 488.

Technical effect of seals. See Collins v. Blantern; Jackson v. Cleveland; Gibson v. Warden; Loach, *sub,* Gibson, Abb, 28 Wash. 428, 58 L. R. A. 293-308, ext. n., 92 Am. St. 866-888, ext. n., 102 Am. St. 416.

Joint trespassers; satisfaction by one inures to all when. Colegrove, 6 Duer, 382, 2 Smith, Cas. Torts, 669: cases, citing Guille, *sub,* Squib case. 117 Ky. 260, 111 Am. St. 273-287, ext. n. (is only pro-tanto).

Release of a debtor under seal is valid. Bish. Conts., 2 Wh. Ev. 1063, Ans. Conts., Chit., 1 Add. 363-365; Bender, 78 La. 283, 5 L. R. A. 296, n., Huff. & W., Conts. 87, Spitze, 75 Md. 162, 32 Am. St. 378, n.

Seal essential. Kidder, 33 Pa. 268, Huff. & W., Conts. 625.

Release of one joint debtor releases all. Brown, 5 Dutch. (N. J.) 514, 80 Am. Dec. 226, 3 Sm. Lead. Cas. 2103 (9th ed.); Hale, 145 Mass. 482, 1 Am. St. 475, Huff. & W., Conts. 487. *Contra,* Whittemore, 124 N. Y. 565, 21 Am. St. 708, n. Even if a contrary intention is manifest. Hale.

Accord by one defendant operates for others not sued. Cumber: 311; Jackson, 66 N. J. 319, 55 L. R. A. 87. *Estoppel by deed (sealed instruments).* Christmas. *Contracts under seal.* Bish. Conts. 103-139; Welborn; Loach, 1 Dev. Deeds, 242-254.

Release generally. Suth. Dam., Bish. Conts. 843-849, 2 Wh. Ev. 1063-1071; *sub,* Cumber. See TENDER.

An offer under seal is irrevocable; a seal imports a consideration. McMillan, 33 Minn. 257, Huff. & W. Conts. 54; Cooke: 321.

390. WORRALL v. MUNN (1851), 5 N. Y. 229, 55 Am. Dec. 330-345, ext. n.; Pars. Conts., Chit., Ans. 47, Bish., Ham., Laws., Clark, Story, 245, Hughes' Conts., 1 Dev. Deeds, 271, 314, 357, 3 Wash. R. P. 293, 299, 3 Kent, 48, 4 *id.* 450.

Worrall stated: Escrow deed can only be in favor of a third person.

Ans. Conts. 47; Carter, 51 Kan. 9, 37 Am. St. 259, n., 1 Dev. Deeds, 312-333.

Oral evidence inadmissible to add to or subtract from a deed delivered to a grantee. Worrall; Pym: 52; Jackson v. Cleveland.

Seal added to instrument not by law required to be sealed, is surplusage. Worrall; Gibson.

Agent upon parol authority affixing a seal does not vitiate the principal's contract if it is not by law required to be sealed. Worrall. Power of partner to so bind partner by specialty. Worrall.

Agent without authority in writing may sign contract for principal and bind him, in contracts required by Statute of Frauds to be in writing. Worrall; *Coles v. Trecothick* (1804), 9 Vesey, Jr. 234, 32 Eng. Rep. 592, 7 R. R. 167; 1 Smith, Torts, 233: Mews' E. C. L.; cited, Chit. Conts., Bish. Conts., Pars., Benj. Sales, Browne, Stat. Frauds, 1 Gr. Ev. 268, 2 Gr. Ev. 60, 61; note, 55 Am. Dec. 343, 36 Am. St. 418, 1 Dev. Deeds, 357; Hibblewhite. Delivery of a deed binds a vendor. Worrall.

Acceptance of a deed binds a vendee. Worrall; note, 55 Am. Dec. 345; 2 Warv. Vend. 662: cases. *Res ipsa loquitur.*

Leading Cases.—390. Worrall.

391. KEMBLE v. FARREN (1829), 6 Bing. 141 (19 E. C. L. R.), 3 M. & P. 425, 31 R. R. 366, Sedgk. Lead. Cas. Dam. 432, Brah Dam. 36, Ans. Conts. 255, 256, 3 Pars., 1 Beach, 629, Ham. 471, 472, Laws. 467, Clark, Sto. 1472, 2 Page Conts. 1172-1177, Hughes' Conts., 1 Pom. Eq. 443, 1 Sedgk. Dam. 399, 12 Oreg. 12, 50 Am. St. 875, 1 Suth. Dam. *q. v.* Greenh. Pub. Pol., 2 Gr. Ev. 257, 258, 2 Beach, Eq. 1017, 83 Md. 211, 55 Am. St. 339, Mews' E. C. L.

Cited, §§ 20, 180, 297, Hughes' Proc.

Cited, § 67, Gr. & Rud.

Kemble stated: Stipulated (fixed) damages; parties may contract for. Farren, an actor, engaged to Kemble, a theater manager, to serve him for a fixed period—four seasons. Each agreed to pay the other 1,000 francs as liquidated and ascertained damages, and not as a penalty or penal sum, or the return thereof if either defaulted his undertaking. During the second season F. defaulted and K. sued him for the whole 1,000 francs. *Held,* he could not recover; that, notwithstanding the clear and forceful expression of the contract, nevertheless the sum fixed was a penalty and not fixed damages, and that the parties must have so contemplated.

Sloman; Peachy. Condon, 47 Kan. 126, 13 L. R. A. 670-676, ext. n.; Wilhelm, 21 Oreg. 194, 14 L. R. A. 297, n.; McCurry, 108 Ala. 451, 54 Am. St. 177, n.; Wilson, 83 Md. 203, 55 Am. St. 339, n.; Tayloe, 7 Wheat.; Monmouth Park, 55 N. J. Law. 132, 39 Am. St. 626, n., 19 L. R. A. 456, n. (intent governs and must be clear, else a penalty and not liquidated damages are presumed); Hennessey, 152 Ill. 505, 43 Am. St. 267, n. (intention sought; words do not control. *Verba intentione debent inservire.*

Penalty or liquidated damages. Taylor, 83 Minn. 523, 85 Am. St. 473; Chicago House Wrecking Co., 45 C. C. A. 433, 106 Fed. 385; Stillwell: 73 Ark. 432, 108 Am. St. 42-64, ext. n., 13 Cyc. 89.

Penalties and forfeitures; equity looks to the intent rather than the form.

392. PEACHY v. DUKE OF SOMERSET (1715), 1 Strange, 447, 2 Lead. Eq. Cases, (W. & T.) 2014-2072, ext. n.; 6 Rul. Cas. 540-563, ext. n.; Mews' E. C. L.; Pom. Eq., Bisph., Sto., Beach, 1 Dill. Corp. 352. Cited, § 122, Hughes' Conts.. § 297, Hughes' Proc.; § 67, Gr. & Rud.

Leading Cases.—

393. SLOMAN v. WALTER (1784), 1 Brown, C. C. 418, 28 Eng. Rep. 1213, 2 Lead. Eq. Cas. (W. & T.) 2022-2072, ext. n., 6 Rul. Cas. 543, 562, n. 3 Pars. Conts. 174, Sto. 1472, 2 Page 1167-1188, Hughes' Conts., 1 Sedgk. Dam. 397, 1 Suth. Dam. 282, 2 *id.* 474, Greenh. Pub. Pol. 756, Pom. Eq., Sto., Beach., 2 Gr. Ev. 258, 5 Mews' E. C. L., 498. § 297, Hughes' Proc.

Sloman. Stipulated damages. 1 Suth. Dam. 279-299. *Penalties.* 2 Suth. Dam. 470-481. Fines and penalties. 2 Beach, Eq. 1013-1021.

Forfeitures are odious. Strained and over-riding construction is made against them. Howard v. Harris; Harper: 218; Beach, Eq. 1013; *Ut res magis valeat,* etc.; Bostwick; Madison; 111 Wis. 483 (Construction favors penalty). *Damages may be fixed and liquidated: Modus et conventio,* etc. Greenh. Pub. Pol. 470; Bish. Conts. 1448-1461. Construction; intention of parties sought; *Verba intentione,* etc. Harper: 218; Roe v. Tranmarr.

394. LICKBARROW v. MASON (MASON v. Lickbarrow) (1878), 2 Term Rep. (D. & E.) 63, 5 id. 367, 6 *id.* 131, 1 H. Bl. 357, 6 East. 21, 1 R. R. 25; Ewart, Estop. 177-186 (able *resume*), Mech. Sales, *q.v.*, 1 Smith, L. C. 1159-1254, ext. n., 1 *id.* 693-766, 11th ed. (stoppage *in transitu*), Williston, Sales, 19, 4 Rul. Cas. 756-789, n., 7 Rob. Prac. 495, 2 Kent, 541-549, 1 Pars. Conts., 3 *id.* 273, 443, Ans. 230, 1 Chit. 277, 601, 608, 2 *id.* 1370, 1371, Whart. 973, Sto., Clark, 543, 2 Add. 603, Smith, 480, Hughes' Conts.; Knox, 148 N. Y. 441, 31 L. R. A. 779; 1 Danl. Nego. Insts. 803, 2 *id.* 1634, 1727, 2 Pars. N. 34, 80, 212, Ror. Interstate Law, 90, Bisph. Eq. 252, Poor on Bills of Lading, *q. v.*, 11 L. R. A. 348, Lind. Part. 652, Mews' E. C. L. (Stoppage *in transitu.*)

Cited, p. 3; §§ 154, 184, 329, Hughes' Proc.; §§ 40, 150, 151, 180, 288, 307, Gr. & Rud.

Lickbarrow stated: Trover for a cargo of corn. Plea, the general issue. One Freeman, of Rotterdam, Zealand, sent an order to Turings, of Middleburg, to ship a quantity of corn to Liverpool, which they accordingly did, July 22, 1786, by the ship "Endeavor," whose captain, Holmes, acknowledged the delivery of the corn by four bills of lading in the usual form, *unto orders or assigns,* one of which he kept, and two of which were indorsed in blank by Turings and sent to Freeman with an invoice of the corn shipped, and the fourth was retained by Turings. During the carriage, F. became bankrupt, and T. learning of this sent the bill of lading they had to Mason, of Liverpool, with a special indorsement to deliver the corn to Mason for T.'s benefit. Mason was T.'s agent and stood in his shoes. F., the bankrupt, had sent two bills of lading to Lickbarrow, duly negotiated, for a valuable consideration. L. stood claiming under F. as an innocent purchaser for a valuable consideration, and he therefore demanded the goods, and brought this action. The court *held* for plaintiff that a *bona fide* assignment of a bill of lading

Leading Cases.—394. Lickbarrow.

defeats the vendor's right to stoppage *in transitu.*

Sewell v. Burdick (Burdick v. Sewell) (1884), 10 App. Cas. 74-106, 4 Eng. Rul. Cas. 758-789, n., Mews' E. C. L.; Halifax v. Wheelright (1875), 10 Exch. 183 (blanks left in check if filled by holder, the drawer must stand the loss, as in *Young v. Grote*). Ewart, Estop. 185.

"Where one of two equally innocent persons must suffer from the fraud of a third, he who first trusted must first suffer." Lickbarrow; Maclay: 327. *Culpa tenet suos auctores.* 190 Mass. 27, 112 Am. St. 309, n.

This principle founds the liability of the principal for the acts of the agent.

McManus; 1 Wat. Tres. 49; Young v. Grote; Angle v. Ins. Co.; Bisph. Eq. 252; City Nat. Bank v. Kusworm; 7 Rob. Prac. 459; U. P. R. R., 45 Neb. 57, 50 Am. St. 451; Knox v. Eden, etc., 148 N. Y. 441, 31 L. R. A. 779 (excellent *resume*); Lyndonville, 68 Vt. 81, 54 Am. St. 874, n.

The one most at fault and who might have protected himself must first suffer. German-Am. Savings Bank, 17 Wash. 315, 38 L. R. A. 259. Twyne's Case is founded upon this idea. 10 Rul. Cas. 494; Ryall; *Allegans,* etc.

A perfect deed must be delivered before title passes. Adding one's name as a grantee and seals without authority, will convey no title, not even to a *bona fide* purchaser. Westlake, 184 Mass. 260 (strict case).

Drawee of forged checks to a fictitious payee, paying them to one who received the money, where the payee was not identified by the recipient, may recover from him. Canadian Bank, 30 Wash. 484, 60 L. R. A. 955; Union Trust Co. v. Preston. This phase of negligence is important in contract.

The foregoing rule is very analogous to the principle in Scott v. Shepherd (Squib Case) and its cognates. Qui primum peccat ille facit rixam. Hadley v. Baxendale.

Stoppage *in transitu;* negotiation of bills of lading to defeat it. Bird, 4 Exch. (Eng.) 798: cited, Bro. Max. 871; Missouri R. R., 82 Tex. 195, 27 Am. St. 861 (negotiability of bills of lading; stoppage *in transitu*); 2 Mech. Sales, 1224-1613.

Purchaser of chattels from one clothed with indicia of ownership, for a valuable consideration, takes title.

Allegans, etc.; Ewart, Estoppel, 181; Bentley; Bish. Conts. 673; Fitzsimmons: 384; Sturge, 2 Mylne & K. 195, 39 Eng. Rep. 918, Mews' E. C. L.; Bigl. Fraud 308, Bisph. Eq. 252, 10 Rul. Cas. 194; 1 Wat. Tres. 409, 410; 1 Mech. Sales, 154-170; Bentley, 70 L. R. A. 787-796.

The rights of a *bona fide* purchaser rest upon this equity. It is a leading rule in the law of commercial paper. It is a leading rule of equitable estoppel.

Swift; Bassett: Horn v. Cole; Pickard; 10 Rul. Cas. 494; Ewart on Estoppel, citing the last two cases, and also Young v. Grote, Miller v. Race and cognate cases.

Leading Cases.—394. Lickbarrow.

It also vitiates otherwise valid proceedings. Watkins v. S.; *Ex dolo malo,* etc.

Delivery to carrier is delivery to consignee; who may sue for loss or injury to freight. Grove, 8 How. 429, 12 L. ed. 1142, n.

Stoppage in transitu; right of, how enforced. Lickbarrow; 2 Mech. Sales, 15-24, 1613; Benj. Sales, 2 Ror. R. R. 1333-1345, Ror. Inter-State Law, 100-103, 1 Pars. Conts. 295-609; Harris, 85 Tex. 254, 34 Am. St. 796, n., 2 Kent, 541-549; Kingman, 84 Mich. 608, 11 L. R. A. 347, n.; Sewell v. Burdick (Burdick v. Sewell), *supra.* A wrong-doer, delivering goods to a carrier, gives the latter no lien against owner. 1 Pars. Conts. 252; Bentley. See Calye's Case: 356. *Bills of lading, negotiability of.* Douglas, 86 Ky. 176, 9 Am. St. 276, n. Corporate stock, if lost and sold by a thief, no title passes. *Sub,* Bentley.

Equitable estoppel. Horn; Mitchell; Young; Loftus; Horn v. Baker; *Allegans,* etc.; Ewart on Estoppel. See ESTOPPEL; EQUITABLE ESTOPPEL.

395. BASSETT v. NOSWORTHY (1673), Rep. Temp. Finch, 102, 23 Eng. Rep. 55, 2 Lead. Eq. Cas. (W. & T.) 1-228, ext. n. (discussing equitable assignments and *bona fide* purchaser), 21 Rul. Cas. 702-847, ext. n.; 10 Rul. Cas. 540; Bausman, 38 Minn. 197, 8 Am. St. 665; 1 Pom. Eq. 200, 417, 2 *id.* 581, 682, 740, 742, 744, 761, Bisph. 39, 263, 266, 267, 1 Perry, Trusts, 218, 220, Adams, 149, 163.

Cited, §§ 147, 148, 150, 184, 326, 329, Hughes' Proc.; §§ 289, 307, Gr. & Rud.

Bassett stated: An heir-at-law complained of a purchaser from a devisee under the will of his ancestor to discover a revocation of the will. The purchaser pleaded that he bought *bona fide* for a valuable consideration, without notice of any revocation. *Held,* good. Bassett; Phillips, 4 De G., F. & J. 208, 45 Eng. Rep. 1164, 10 Rul. Cas. 533, n.; Mews' E. C. L.; 1 Beach, Eq. 382-393.

Bona fide purchasers; notice; purchasers of choses in action, personal property, real estate and commercial paper, when protected. Le Neve: 396; Bell v. Twilight; Agra Bank v. Barry; Fair v. Stevenot; Swift (commercial paper); *Allegans,* etc.; *Assignatus utitur,* etc.

Corporate stock; bona fide purchaser of; notice; secret trusts attach to. Winter, 89 Ala. 544, 3 Am. R. R. & Corp. Rep. 208-217, n., 7 So. 773.

Chattels; bona fide purchasers of; who are. Henderson's Distilled Spirits; Fitzsimmons: 384; *Ex dolo malo,* etc.; 1 Benj. Sales, 649, n. Bentley.

"Where one of two equally innocent persons must suffer from the fraud of a third, he who first trusted must first suffer." Bassett; Lickbarrow; *Allegans,* etc.; *Qui prior est tempore,* etc.: He who is first in point of time has the better title. *In equali jure melior,* etc.: Where there is equal equity, possession must prevail. Bassett, 1 Lead. Eq. Cas. 53, Bro. Max. 713, Bisph. Eq. 264; Rice, 23 L. J. 289, 2 Drew. 73,

Leading Cases.—395. Bassett.

10 Rul. Cas. 507; Mews' E. C. L.; Northern Counties, 26 Ch. Div. 482, 10 Rul. Cas. 507; Mews' E. C. L.

Commercial paper. Swift: cases. *One cannot sell a right he does not possess.* 2 Lead. Cas. 50-61, 70, 71; *Assignatus utitur,* etc.; Bentley.

Payment must be actual and full, and this must be averred specifically. 2 Lead. Eq. Cas. 74-85; Swift; Tillman, 78 Tex. 597, 22 Am. St. 77, n., 11 L. R. A. 628; Young, 94 Mo. 581, 3 Am. St. 405, n. (full payment must be made); Baker, 157 U. S. 212 (bad faith shown by small consideration); 1 Beach, Eq. 389; Adams, Eq. 151; Tillman, *supra;* Peay, 48 S. C. 496, 59 Am. St. 731, n. See Sto. Eq. Pl. 697 (allegation may be waived).

Consideration is looked to, and protection is measured by that; payment after notice not effectual, and will not protect. Tillman, *supra;* 1 Beach, Eq. 388, 389.

Equitable assignee; how affected by notice of other equities. Bassett; Field v. Mayor: 84; Bisph. Eq. 261-279; 1 Beach, Eq. 319-345; 10 Rul. Cas. 411-614; Brice: 398.

Equitable owner may avail himself of want of notice. Coyler, 5 H. L. Cas. 909, 10 Eng. Rep. 1159, Mews' E. C. L., Bisph. Eq. 258.

Notice of assignment should be given by assignee to debtor to protect himself from subsequent dealing between the assignor and debtor. Note, Bassett; 1 Beach, Eq. 343; Foster, 159 Pa. 477, 39 Am. St. 696 (mortgagor may pay mortgagee before notice of his assignment). One of several assignees first giving notice gains priority. Dearle, 3 Russ. 1-60, 38 Eng. Rep. 475: cases; 10 Rul. Cas. 478; Mews' E. C. L.; 2 Pom. Eq., p. 965; Ryall; Compton.

Chattel mortgagees are governed as other assignees or vendees. Wright, 51 Minn. 321, 38 Am. St. 504 (notice of prior equities effects); Fair v. Stevenot. *Equitable assignments.* 7 Encyc. Pl. & Pr. 731-786.

Equitable set-off. The right to this existing by reason of the insolvency of the debtor, it cannot be affected by his assignment of his assets. Citizen's Bank, 92 Tenn. 437, 36 Am. St. 96, n.

Judgments, assignments of; rights of assignee. Western Nat. Bank, 90 Ga. 339, 35 Am. St. 210, n.

Bona fide purchaser must plead his rights affirmatively. Holdsworth, 113 Mo. 508, 35 Am. St. 719, n.; 1 Beach, Eq. Pr. 346.

Subsequent purchaser is presumed to be a purchaser for value. Anthony, 130 Ill. 128, 17 Am. St. 281-290, n.: cases.

396. LE NEVE v. LE NEVE (1747), Ambler, 438, 3 Atk. 646, 1 Ves. 64, Ld. Eq. Cas. (W. & T.) 109-223, 26 Eng. Rep. 291, 21 Rul. Cas. 774-847, ext. n., Mews' E. C. L.; 2 Pom. Eq. 594, 2 Beach, Eq. 346, 362, 10 Rul. Cas. 521-524 (priorities); *Agra Bank v. Barry,* Mech. Ag. 721, Dembitz, Real Prop., Pom. Eq., 1 Sto. Eq. 186, 397, Bisph., Lind. Part. 141, Dev.

Leading Cases.—396. Le Neve.

Deeds, 1 Perry on Trusts, 217, 222, 223, Adams, Eq. 141-158, 1 Beach, Conts. 354.

Cited, §§ 73, 117, 147, 148, 150, 180, 184, 326, 329, 396, Hughes' Proc.; §§ 38, 124, 289, 307, Gr. & Rud.

Bona fide purchasers of real estate; registry of deeds; possession. Its effect to impart notice of the rights of the occupant. *Qui prior est tempore, potior est jure:* He who is first in point of time is first in point of right. 4 Kent, 170.

Williamson v. Brown; Fair v. Stevenot; Bassett; 94 Tex. 641; Scotch Lumber Co., 132 Ala. 598, 90 Am. St. 953, n. (unregistered deed); *In æquali jure melior est conditio possidentis.* See PRIORITY. *Purchases without value.* Bigl. Fraud, 307-315; 1 Beach, Eq. 346-393; Olds v. Cummings, 31 Ill. 188.

Notice to agent is notice to the principal. Le Neve; Ross; 1 Beach, Eq. 371; Herm. Ex. 327-349. A purchase if tainted in part is tainted *in toto.* 1 Beach, Conts. 354.

Bona fide purchaser of real estate at execution or judicial sale; how far protected. Riley, 97 Cal. 575, 21 L. R. A. 33-54, ext. n.; Herm. Ex. 327-349; Ewart, Estop. 149-153. One is, who buys at his own execution sale. Pugh, 152 Ind. 252, 71 Am. St. 327.

Copyrights; registration of, essential. Law of priority, of rights and of bona fide purchasers attaches to. 2 Pars. Conts. p. 257 (6th ed.), 4 Am. & Eng. Encyc. Law, 161 (outline citation to law of, in 4 Am. & Eng. Encyc. Law. 147-168); 7 Rul. Cas. 66-143. See COPYRIGHT.

Lis pendens; notice from. Tilton; Lis pendens, 1 Beach, Eq. 374-381. *Equitable assignments.* 7 Encyc. Pl. & Pr. 730-786; Bassett.

Priorities. *Qui prior est tempore,* etc.; 10 Rul. Cas. 394-570 (assignments of choses in action; equitable assignment); Brice (priorities): 398.

Purchaser for value without notice; equitable estate. Phillips, 4 De G. & J. 208, 10 Rul. Cas. 533, n.; Mews' E. C. L. 1355, *supra. Pre-existing debt as a consideration. Sub,* Cumber: 311; Swift.

Railroad mortgages; injured persons have priority over. Green R. R., 97 Ga. 15, 33 L. R. A. 806, 54 Am. St. 378-433, ext. n.

Pleading of; facts must be pleaded showing one is a bona fide purchaser. 1 Beach, Eq. Pr. 346: Bassett.

397. RYALL v. BOWLES (or BOLLE) (1750), 27 Eng. Rep. 1074: cases; 1 Ves. 348, 1 Atk. 165, 26 Eng. Rep. 107: cases; 2 Lead. Eq. Cas. (W. & T.) 1533-1674, n., 10 Rul. Cas. 494-501, Sto. Eq., Pom., Bisph., Pars., Conts., Chit., Add., Ham. 357, Whart. 839, Sto. 467, Clark, 534, Hughes' Conts., Greenh. Pub. Pol., Wade, Notice, 433, Sto. Ag. 229, 1 Wash. R. P. 34-36, Perry, Trusts, 68, 345, 438, 33 L. R. A. 267.

Cited, § 158, Hughes' Proc.

Assignments. Notice to debtor of assignment is necessary to protect assignee from further equities. Compton v. Jones; *Qui prior est tempore,* etc.

Notice of an assignee's rights charges one with all loss and liability after such notice. Ryall; Bassett; Le Neve; Swift; 2 Pom. Eq. 753.

Leading Cases.—397. Ryall.

Preference may be given a creditor by assignment. Barbett, 147 U. S. 476, Marbury, 7 Wheat. 557, 5 L. ed. 522, n.; Greenh. Pub. Pol. 151, Bish. Conts. 1209, Bigl. Fraud, 532, 2 Sto. Eq. 1036, 1037. See FRAUD; CONVEYANCES; Twyne's Case. If a small part is retained to defeat the effect of the preference, this will be held a fraud. 3 L. ed. (U. S.) 614, n.

Assignment by a debtor of all his property gives the U. S. the preference. Field v. U. S., 9 Pet. 182, 9 L. ed. 94, n.

Choses in action. Ans. Conts. 217-234, 10 Rul. Cas. 411-570, 7 Encyc. Pl. & Pr. 732, 733; Warmstrey; Grain; 2 Chit. Conts. 1352, 1371; 10 Rul. Cas. 411-570.

Assignors and assignees. Bish. Conts. 1177-1199; 10 Rul. Cas. 411-570. *Assignments generally.* 1 Beach, Eq. 319-345, 7 Encyc. Pl. & Pr. 730-736; *Assignatus;* Warmstrey.

398. BRICE v. BANNISTER (1878), 3 L. R., Q. B. 569, 10 Rul. Cas. 411-425, n., Mews' E. C. L.; 1 Pars. Conts. 238, Ans. 225, Ham. 357, Clark, 536, Laws. 360, Hughes. See notes to Lampleigh; Miller v. Race; 1 Smith, L. C., 1 Beach, Eq. 374. Cited, § 326, Hughes' Proc.

Brice stated: Bannister hired one G. to build a ship, to be paid for in installments. G. assigned one installment to Brice, who presented it to Bannister, who refused to take notice of it, and afterwards paid G. the amount due. Afterwards Brice sued B. for the assigned installment. *Held,* he could recover.

Assignments operate without the assent of the debtor. Ans. Conts. 245; Grain.

A garnishee of a debtor is defeated if he is notified of the assignment before he answers the garnishee summons. Drake on Attachment, § 528.

Row v. Dawson (1749), 1 Ves. Jr. 331-332, 27 Eng. Rep. 1064, 2 Lead. Eq. Cas. (W. & T.) 1551, Mews' E. C. L., 1 Danl. Nego. Inst. 16*a*, 23, 1 Pars. Conts. 234, 3 *id.* 300, 2 Chit. Conts. 1360, 1 Pars. N. B. 336, 1 Pom. Eq. 137, 169, Bisph. 164, 172, 2 Sto. 1044-1047, 1 Beach, 321-326, 1 Perry, Trusts, 68.

Assignments of choses in action cognizable in equity. Row; 1 Beach, Eq. 319, 345; Zabriskie, 13 N. Y. 322, 64 Am. Dec. 541, n.; Warmstrey.

Accounts or earnings may be assigned. Sandwich Mfg. Co., 83 Ia. 567, 14 L. R. A. 126, n. Wages to be earned may be. Rodijkeit: —O.— 5 L. R. A. N. S. 565-570.

Salary of a public officer cannot be assigned. Nat. Bank, 86 Tex. 303, 40 Am. St. 833-837, n., Schwenck, 46 N. J. Eq. 560, 19 Am. St. 438; Bliss, 58 N. Y. 442, 17 Am. Rep. 273; Greenh. Pub. Pol. 351-355; Dickinson.

Mechanics' liens may be assigned. Davis, 18 Wall. 659. An assignee may consolidate and file liens. Kinney, 58 Minn. 455, 14 Am. St. 528, n.

Leading Cases.—398. Brice.

Torts; damages arising out of, are assignable. Moore, 32 Cal. 590, 7 Mor. Min. Rep. 355; Pom. Rem. 147, Bliss, Pl. 38-43; *Actio personalis*, etc.

Mere personal torts that die with the person are not assignable. Slauson, 4 Wash. 783, 31 Am. St. 948, n.; Hunt, 47 Minn. 557, 14 L. R. A. 512, n.; *Actio personalis.*

Right to complain of fraud is non-assignable. Sanborn, 92 Cal. 152, 27 Am. St. 101, n.; Whitney, 94 Cal. 146, 15 L. R. A. 813, n. (right to set aside judgment).

Right to recover land out of which one is defrauded may be assigned. Connecticut Ins., 117 Mo. 261, 38 Am. St. 656, n. See *Assignatus*, etc.

399. WIGGLESWORTH v. DALLISON (1779), 1 Doug. 201, 1 Smith, Lead. Cas. 928-965, 1 *id.* 545-578, 11th ed. (reviews English cases), 15 Rul. Cas. 542, Laws. Us. & Cus. 169, 2 Pars. Conts. L. 754, Chit. Ans. 248, 1 Add. 244, Jones, Construc. 115, 1 Beach, Ham. 394, Smith, 56, Clark, 580, Sto. 824, 1282, Hughes' Conts., Bro. Max. 416, 8 Rul. Cas. 304, 356, 1 Wash. R. P. 137, 2 Whart. Ev., 2 Gr. Ev. 251, Mews' E. C. L.

Cited, §§ 225, 231, Hughes' Proc.

Wigglesworth stated: Custom; usage. A custom that a tenant may have the way-going crop is valid unless repugnant to the lease.

Hutton, 1 M. & W. 466-479, 2 Gale, 71, 15 Rul. Cas. 548; Mews' E. C. L.; Bro. Max. 415, Smith, Conts. 56.

Construction; usage; custom; evidence. See *Optimus interpres*, etc.; Jones, Construc. 96-109; Smith, 114 N. Y. 190, 11 Am. St. 627, n., 4 L. L. R. A. 392, n.; McClusky, 20 Or. 108, 10 L. R. A. 785, n.

Custom and usage as elements in contracts. Bish. Conts. 438-460, 2 Gr. Ev. 248-252; Smith, *supra;* 8 Rul. Cas. 274-359, n.; 1 Beach, 747-770.

Must not contradict contract. Phoenix Ins., 49 Kan. 178, 33 Am. St. 360, n.; 8 Rul. Cas. 275-309: cases; Yates, 6 Taunt, 446 (1 E. C. L. R.); 16 R. R. 653, Mews' E. C. L.; *q. v.* and *sub nom*, Yates v. Pym; 2 Marsh, 141 (4 E. L. R.); Holt, N. P. 95 (3 E. C. L. R.), 8 Rul. Cas. 349-359; Alhambra, 6 P. D. 68, 8 Rul. Cas. 351, n.; Mews' E. C. L. 242; 1 Beach, 733-757.

Parol (oral) evidence to affect writing. Pym: 52; Cooper, 19 Wend. 386, 32 Am. Dec. 512, Laws. Us. & Cus. 339.

Leases; custom is admissible if consistent with the terms in the lease. Wigglesworth, Senior, Holt, N. P. 197 (3 E. C. L. R.), Mews' E. C. L., Bro. Max. 414; Webb, 2 Barn. & Ald. 746, Mews' E. C. L., Bro. Max. 415.

The rule in the *Wigglesworth Case* is analogous to that in *res adjudicata*, where the rule is, that whatever was tried may be shown by evidence *aliunde* if consistent with the record pleaded in defense. Mondel: 77. See Pym; Woollam; ORAL EVIDENCE; 1 Gr. Ev. 275.

400. BLACKETT v. ROYAL EXCHANGE ASSUR. CO. (1832), 2 Cromp. & Jer. 244, 2 Tyr. 266, Laws. Us. & Cus. 413, 14 Rul. Cas. 179 (construction), 2 Pars. Conts. 467, 663, 1 Chit. 157, 1 Add. 244, 3 *id.* 1158, 1 Beach. 140, 734, 757, Jones, Construc. 64, 68, 104, Smith, 68, 69, Sto., Clark, 586, Laws. 385, Hughes' Conts., Sto. Ag. 74, Whart. Ag. 223, 2 Whart. Ev. 958, 972, n., 13 Mews' E. C. L. Note, Wigglesworth, 1 Smith, L. C. 946, 3 Kent, 260.

Leading Cases.—400. Blackett.

Blackett stated: Cannot vary a writing. Insurance on ship, boat, etc. Evidence of usage of the underwriters that they never paid for the loss of boats on the outside of a ship slung upon the quarter is inadmissible, it being shown that a boat is always carried there, and that it is the proper place for a boat. S. P. in Myers, 3 El. & El. 306 (107 E. C. L. R.), 14 Rul. Cas. 656 (interpretation), Mews' E. C. L.

Every legal contract is to be interpreted in accordance with the intention of the parties making it. *Verba intentione debent inservire.* And usage, when it is reasonable, uniform and well settled, not in opposition to fixed rules of law, not in contradiction to the express terms of the contract, is deemed to form a part of the contract and to enter into the intention of the parties, when it is so far established and so far known to the parties that it must be supposed that their contract was made in reference to it.

Walls, 49 N. Y. 464: cases, 10 Am. Rep. 407, 1 Beach, Conts. 434, 753, 757, Laws. Us. & Cus. 747-770; Newhall, 114 N. Y. 140, 1 Gr. Ev. 292, 294, Bro. Max. 682, 889, 890, 2 Pars. Conts. 541. Consider the Wigglesworth, Harper, Pym and Woollam cases with the above. Hughes' Proc.

Custom; usage; must not contradict contract. Blackett; Wigglesworth; Hackley, 50 Mich. 43, 21 Am. Law. Reg. (N. S.) 109-118, n., 2 Kent, 255; Malpas; The Schooner Reeside (1837), 2 Sum. 567: stated, Bro. Max. 928, 931; Vogt.

Requisites of usage—custom. It must be established, certain and uniform, continued, general, known, reasonable and acquiesced in, reasonable, consistent and not repugnant to the contract, accord with and not contravene statutes, consistent and not conflict with public policy. Laws. Conts. 383-385 (able *resume*). *Construction by parties; estoppel. Practical construction. Communis error facit jus.* 1 Beach, 724: cases. 14 Rul. Cas. 577-833.

Ancient instruments, if obscure or doubtful, usage may be resorted to to explain, but not control the meaning. Chad, 2 Brod. & Bing. 403-409 (6 E. C. L. R.), 23 R. R. 477, 14 Rul. Cas. 691-699, Mews' E. C. L.

401. SMITH v. WILSON ("RABBIT CASE") (1832), 3 Barn. & Adol. 728 (23 E. C. L. R.), Laws. Us. & Cus. 335, Mews' E. C. L., 3 Pars. Conts. 655, 1 Add. 245, 2 Pars. 663, Ham. 394, 462, Laws. 383, Whart. 735, Sto., Clark, 582, 1 Chit. 132, 143, 144, 1 Add. 245, Hughes' Conts., 2 Whart. Ev. 940, 972.

Smith stated: S. leased a rabbit warren of W. and was to have at the end of his tenancy £60 for each 1,000 rabbits left on the warren. These were estimated at 19,-

Leading Cases.—401. Smith.

200, but W. only had to pay for 16,000, for the reason that by usage in counting rabbits on a warren, it takes 1,200 to make a thousand. This usage was upheld as sound law.

Custom; usage. Usage is admissible to explain a contract. Pym; Soutier, 1 Chit. Conts. 118, Bro. Max. 928, 931. *Contemporanea expositio,* etc.

402. SOUTIER v. KELLERMAN (1853), 18 Mo. 509, Laws L. C. Simp. 81, 85, Ans. Const. 326, Ham. 394, Huff. & W., Conts. 508, Laws. 383, Clark, 582, Hughes' Conts., Jones, Construc. 64, 115, 2 Whart. Ev. 961.

Soutier stated: S. bought 4,000 shingles, and for these eight bundles were delivered containing only 2,500 shingles, as S. counted them. But in counting shingles so many are estimated in a bundle, and this usage was upheld, and S. was compelled to accept the count.

Evidence; usage; custom. Usage may be shown to explain a contract. *Optimus interpres rerum usus:* Bro. Max. 917; Cooper; Smith; Blackett; Pym. See ORAL EVIDENCE. Oral evidence admissible to explain meaning of words. Jones, Construc. 54-68.

403. COOPER v. KANE (1838), 19 Wend. 386, Laws. Us. & Cus. 339, 32 Am. Dec. 512, Laws. L. C. Simp. 80, Laws. Conts. 384, Clark, 581, Ham. 394, Partridge v. Ins. Co. Hughes' Conts.

Usage and custom. Usages of trade may be shown; terms and incidents may be added. *Held,* sand excavated belonged to the excavator by reason of custom. Wigglesworth.

Usage; elements of. Mech. Ag. 281. Will not justify commissions to both parties, for usage must be moral and not contravene the doctrine of *Salus populi,* etc. Keech; Governor (1848), 5 Gratt. (Va.) 24, 50 Am. Dec. 95-105.

Consent makes law; acquiescence in a custom contrary to law often available. Governor. Custom cannot oppose a statute. Noble: 251. *Modus et conventio.*

Usage; custom; specially pleaded, if relied upon. Governor; Morowske, 53 N. Y. St. Rep. 220. New matter must be pleaded. McKyring: 33.

404. TARLING v. BAXTER (1827), 6 Barn. & Cress, 360 (13 E. C. L. R.), 9 D. & R. 272, 23 Rul. Cas. 257, Adams, Sales, 809, Williston, Sales, 25, Pars. Conts. Chit. 521, Sto. 1010, Hughes' Conts., Mews' E. C. L. 451, 1 Benj. Sales, 316, 2 *id.* 1126, 2 Kent, 492*a*, 23 Rul. Cas., 1 Mech. Sales, 483, 484, 725. § 186*a*, Hughes' Proc.

Tarling stated: Sales; when title passes. T. sold to B. on Jan. 4, 1825, a stack of hay in the field for £145, to be paid on Feb. 4, and before the stack was cut, the hay to stand in the field until May 1st. On Jan. 20th the hay was burned, and the important question arose, who should bear the loss. *Held,* it was B.'s loss; that this was an immediate and not a prospective sale; that nothing more remained to be done before title vested; that the title passed on Jan. 4th.

Foley, 98 Ala. 176, 39 Am. St. 39-44, n.; C. v. Hess, 215. *Cujus est dominium, ejus est periculum.* Hallett: 308*d*.

There must be a thing in esse capable of being delivered or assigned else there is no sale. 1 Benj. Sales, 76-84; Low, 108 Mass. 347, 11 Am. Rep. 357 (sale of fish to be caught carries no title); Wheeler's, 2 Metc. (Ky.) 474, 74 Am. Dec. 421, 2 Add. Conts. 644. The product of a whaling expedition may be assigned. 2 Sto. Eq. 1040. See *Assignatus,* etc.; Forsyth, 112 Ga. 199, 81 Am. St. 28-46, ext. n.; Hibblewhite; Everman, 52 Miss. 653, 24 Am. Rep. 682, 3 Cent. L. J. 735.

Sale; what constitutes. S. v. Wingfield (1893), 115 Mo. 428, 37 Am. St. 406, n.; Bretz, 117 Pa. 589, 2 Am. St. 706, n. *Acceptance; essential.* Billin, 9 Colo. 394; White: 303. *Price.* 1 Mech. Sales, 204-214.

Sale of part of a mass; title does not pass until it is separated. New Eng. Dressed Meat, 165 Mass. 328, 53 Am. St. 516.

Payment must be made, unless waived, before title passes. Drake, 136 Ala. 261, 96 Am. St. 25.

Leading Cases.—404. Tarling.

405. GIBBS v. BENJAMIN (1872), 45 Vt. 124, 13 Am. Law Reg. (N. S.) 93, n.; Sto. Conts. 1009, Hughes' Conts., 1 Mech. Sales, 367, 714.

Gibbs stated: Action on book account for cord wood which G. alleged he sold B. and which was carried away by the flood waters of Lake Champlain while they were negotiating about the amount and value of the wood. G. and B. had met and taken measurements, and were making estimates and offers when the wood was lost. The last proposition was that B. should take the wood at 204 cords at $3.50 per cord, which he refused to do. *Held,* that the title did not pass; that whenever anything remains to be done by either or both parties precedent to the delivery, the title does not pass.

Sales; when bargain is complete the title passes at once, unless something remains to be done. Tarling; Acraman; Tempest.

Acceptance, full and complete, is essential for contract. White: 303; Anson, Conts. 2, Wambaugh, Study of Cas. 113, Bish. Conts. 329. Contracts must be certain. Wain: 331; Kelley: 307; Sturdivant: 410; Cooke: 321: cases. See ASSENT. *Non hæc,* etc. *Of contracts respecting existing chattels not yet identified.* 1 Mech. Sales, 694-752.

406. ACRAMAN v. MORRICE (or MORRIS) (1849), 8 C. B. 449 (65 E. C. L. R.); Chit. Conts., Pars. Conts., Add. Conts., 1 Mech. Sales, 508, 1 Benj. Sales, Mews' E. C. L., Whart. Ev., 3 L. R. A. 199, 2 Kent, 496; Dunn v. S. (1889), 82 Ga. 27, 3 L. R. A. 199, n.

Acraman stated: M. contracted with one Swift for trunks of fallen trees yet to be separated from the tops. M. made part payment. S. was to separate the tops from the trunks and send the latter to M. But

Leading Cases.—406. Acraman.

S. became bankrupt and A. was his assignee. M. afterward entered on and carried off all the timber he had paid for, and A., the assignee, sued M. for trespass and conversion. *Held,* M. was guilty; that no title passed so long as anything yet remained to be done. See Tarling, *supra,* and C. v. Hess: 215.

407. SHINDLER v. HOUSTON (1845), 1 Denio, 48, 1 N. Y., 261, 49 Am. Dec. 316-340, ext. n., Williston, Sales, 824, 37 Am. Rep. 19, 3 Pars. Conts. 45, Beach, 559, Chit., Clark, 142, Sto. 1008, 1011, Baker, Sales, 1 Mech. Sales, *q. v.*, Benj. Sales, 2 Whart. Ev. 874, 875, Hughes' Conts.

Shindler stated: H. contracted for lumber, and at a price exceeding $50. All was agreed upon and finally S. said to H.: "The lumber is yours." H. then told S. to get the inspectors' bill and bring it to him and he would pay the amount, which was accordingly done the next day, when H. refused to pay as he agreed. Then S. sued H. for the price and recovered. *Held,* a valid delivery and acceptance. Note, 37 Am. Rep. 19.

Symbolical delivery, when valid; when sufficient. See Elmore; King, *supra;* Twyne's Case, Sale of trees; putting vendor in possession, sufficient. Leonard, 85 Md. 666, 37 L. R. A. 449. See Lyon, *sub,* FRAUDS AND PERJURIES.

It should be remembered that contracts for more than $50 must be in writing under the statute of frauds, unless there is a delivery and acceptance.

408. TEMPEST v. FITZGERALD (1820), 3 Barn. & Ald. 680 (5 E. C. L. R.), Shir. Lead. Cas. 28, Browne, Stat. Frauds, 326, Chit. Conts., Pars., Add., Sto. 1017, 1385, Hughes' Conts., Benj., 2 Whart. Ev. 875, 2 Kent, 493, 503, 1 Mech. Sales, 385, 2 *id.* 1489, 12 Mews' E. C. L. 437.

Tempest stated: Sales; Statute of Frauds; goods, wares and merchandise. F. was visiting and attending races. He bought a horse of T. for 45 guineas, considered cash, and F. gave orders for future stabling and treatment of the horse; yet it was to remain with T. for a few days until F. was ready to return home. In the meanwhile the horse died and T. sued for the price, and F. defended under the Statute of Frauds because the price exceeded £10 (usually $50 in America). There was no acceptance and delivery, nor earnest money paid. *Held,* the defense was good; that no title passed under § 17, Statute of Frauds. See FRAUDS AND PERJURIES.

Contract of sale under the Statute of Frauds. 1 Mech. Sales, 280-474.

Acceptance under Statute of Frauds. Devine, 75 Conn. 375, 96 Am. St. 211-229, ext. n.

409. ELMORE v. STONE (1809), 1 Taunt. 458, Shir. Lead. Cas., Laws. Lead. Cas., Baker on Sales, Browne, Stat. Frauds Chit. Conts., Pars., Bish., Beach, Ans., 2 Add. 559, Ham. 301, Sto., Hughes' Conts., Benj. Sales, 2 Whart. Ev. 875, 2 Kent, 1

Leading Cases.—409. Elmore.

Mech. Sales, 385, 386, 2 *id.* 964, Mews' E. C. L.

Cited, § 159, Hughes' Proc.

Elmore stated: E., a liveryman and horse dealer, negotiated with S. for the sale of a span of horses for £200. S. represented that he had neither servant nor stable, therefore E. must keep them at the livery for him. Thereupon E. removed the horses from his sales stables into another stable—his livery stable. When E. sued for the price S. pleaded the Statute of Frauds, but it was *held* that such removal was sufficient constructive delivery; for after that E. held the horses not as owner, but as any other livery-stable keeper might have done.

King, 35 Ark. 190, 37 Am. Rep. 11-22, n., stating Elmore. See Baldey, *sub,* FRAUDS AND PERJURIES; 1 Beach, Conts. 562. *Hurldburd v. Bogardus* (1858), 10 Cal. 518 (there must be visible change of possession; continuance of a former agent in possession is insufficient); 1 Chit. Conts. 570-573. See Twyne's Case; Dooley, 180 U. S. 126 (from the same appearances, continuity is presumed).

Chattel in possession of a third person, *e. g.,* a lessee, may be sold. Corning, 69 N. H. 390, 76 Am. St. 178, n. And also of real estate under the modern rule. Kleber, Sales.

410. STURDIVANT v. HULL (1871), 59 Me. 172, 8 Am. Rep. 409; Mech. Ag., Whart., Huffc., Reinh., Tiff. Ag., Rand. Com. Pap., Dank., Jones, Construc., Whart. 810, Clark, 741. Cited, §§ 20, 186, 186*a*, 202, 215, 219, 225, 230, 237, 254, 256, 294, Hughes' Proc.; § 303, Gr. & Rud.

The question was, who was the maker of this note:

"$225.00 Portland, Dec. 20, 1869.

"Four months after date I promise to pay to the order of Sturdivant & Co. two hundred and twenty-five dollars with interest. Value received.

U. S. I. R. Stamp. 25 cts. JOHN F. HULL, Treas. St. Paul's Parish."

Held, this was Hull's individual note, and that "Treas.," etc., were words *descriptio personæ.*

Falk v. Moebs (1888), 127 U. S. 597-607: cases (a very instructive case): Casco Bank, 139 N. Y. 307, 36 Am. St. 705, n.; Jefts.

Again the question arose thus:

"Twelve months after date the president, by order of the Board of the Hustonville and Bradfordsville Turnpike Road Co., promises to pay Mahaly Caphart three hundred and fifty dollars, with six per cent. interest from date, this 30th of Nov., 1865.

"E. J. Dodd, Pres.
"James J. Drye,
"Wm. R. McClain,
"Wm. Spragins,
"M. P. Drye,
"James Yowell."

And this was *held* to be the note of the signers; they were resolved to be the makers. 3 Bush (Ky.), 584, 96 Am. Dec. 258; Sto. Ag. 151; Brown, 156 Mass. 28, 15 L. R. A. 509, n., 32 Am. St. 430, n., Casco Bank, 139 N. Y. 307, 36 Am. St.

Leading Cases.—410. Sturdivant.

705, n.; Stone, *post*. *Contra*, Hager, 4 Colo. 90, 94.

"Office of Belleville Nail Mill Co.," and concluding, "Charge same to account of Belleville Nail Mill Co., W. C. B., Prest., J. C. W., Sec.," is the bill of the company. Hitchcock v. Buchanan (1881), 105 U. S. 416, 26 L. ed. 1078, n.; Mech. Ag. 437, 1 Rand. Com. Paper, 138, 140; Matthews, 87 Iowa, 246, 19 L. R. A. 676-682, n.; Miller, 150 Mass. 140, 6 L. R. A. 71, n.; Hobson, 76 Cal. 203, 9 Am. St. 193, n.; Liebscher, 74 Wis. 387, 17 Am. St. 171, 5 L. R. A. 496; Braun, 187 Ill. 283, 79 Am. St. 221.

Rewards; offer of by selectmen of town, are viewed according to the *Sturdivant* and *Caphart* cases. Brown, 156 Mass. 28, 32 Am. St. 430, n., 15 L. R. A. 509, n.

The body of a bill referred to the public account of the Republic of France, and it was signed "Le Tombe, Le Consul-General." The Republic was the maker, not Le Tombe. Jones v. Le Tombe (1798), 3 Dall. (U. S.) 384, 1 L. ed. 647.

Public agents are not bound unless it clearly appears it was intended to bind them; therefore the strict rule relaxes to absolve the public agent, but only to hold the governmental agency, and thus to make the paper better. The public agent can bind himself, if such was the intention, upon the fundamental principle that one may make any contract he pleases. § 3, Hughes' Conts. Note, 32 Am. St. 434; Clark v. Des Moines. Agreeably to the Jones Case, see School Town of Monticello, 72 Ind. 91, 37 Am. Rep. 139, n. (notes are set out in; instructive case); McCurdy, 21 Wis. 199; Field, Ultra Vires, 548; Baird, 132 Ill. 16, 22 Am. St. 504-514, ext. n. (liability of agent *ex contractu* and *ex delicto*.)

At common law four things must be in writing: 1. *Judicial records* (*see Res adjudicata; Iverslie:* 46. 2. *Deeds* (*see Elwell v. Shaw*). 3. *Commercial paper* (*see Commercial Paper*); *and* 4. *Stipulations of counsel.* Commercial paper was most impregnable from attacks of oral evidence (see Pym: 52), for oral evidence was admissible to affect judicial records. Bauerman: 48. And also the deed in some cases. Elwell v. Shaw; Jackson v. Cleveland. But the philosophy, the genius and the vitalizing life and force of the negotiable instrument constituted its creative ends and purposes inimical to change and alteration. It is made to go forth and speak to all alike, and to be construed for all alike. Commercial paper is a "courier without luggage."

Overton v. Tyler (1846), 3 Pa. 346, 45 Am. Dec. 645-647, n., 1 Am. Lead. Cas. 363-411, n., 1 Danl. Nego. Insts. 6, 61, 4 L. R. A. 492, Rand., Pars. N.; M'Cormick v. Trotter (1823), 10 Ser. & R. 94, 1 Am. Lead. Cas. 366-411, n.: cited, Rand. 100, 1 Danl. 56, 1 Pars. N. 46, 1 Pars. Conts. 264, 3 Kent, 76; Gerard v. La Coste (1787), 1 Dall. (Pa.) 194, 1 Am. Lead. Cas. 369-411, n., 1 Am. Dec. 226: cited, 1 Rand. Com. Paper, 177, 2 *id.* 656, 3 Kent, 77 (negotiable instrument must have negotiable words, like "or order," "or assigns," or equivalent words of negotiability).

These cases show we have a peculiar subject-matter as also do the greater cases of *Miller v. Race* and *Swift v. Tyson.* These cases present a subject-matter, the integrity of which depends on certainty. (Kelley. 304.) A public policy that they speak to all alike, and will be construed for all alike; otherwise the bill or note would be impaired—indeed its nature would be changed. And so it is clear that a most important subject-matter is wholly dependent upon a rule of evidence, upon procedure. So, too, each subject-matter demands its own appropriate pleading and proof, and if these were changed, it would change the subject-matter. 25 Am. Bar Ass'n Rep. 544-558.

One dealing with commercial paper has the right to judge from its face the time, amount, the maker and the payee and for certainty about these the courts stringently construe according to Ut res magis valeat quam pereat.

Crooker v. Holmes (1875), 65 Me. 195, 20 Am. Rep. 687; 1 Rand. Com. Paper, 111, 112, n., 1 Danl. Nego. Insts. 44, 1 Pars. Conts. 265 ("payable when I shall sell the place where I now live," is certain, and means after a reasonable time). Same point in Nunez, 19 Wall. 560, Jones, Construc. 226; Page, 164 Mass. 116, 49 Am. St. 449, 28 L. R. A. 759; Smithers, 41 R. R. 101, 7 L. R. A. 264. *Verba intentione*, etc. All ambiguities are resolved against the maker of a bill or note; *Verba fortius*, etc. He is not allowed to speak Janus-faced: *Allegans contraria*, etc. Abel: 334. *Verba fortius. Contra*, Cheney, 1 Colo. 73: cases; 1 Rand. Com. Paper, 112, 1 Danl. 41-44: cases.

Deeds and commercial paper must disclose the name of the principal on their face, with certainty, else the agent and not the principal is bound, and oral evidence is inadmissible to alter or vary these instruments as to parties. To these is strictly applied *Expressio unius*, etc.

Jefts v. York (1849), 4 Cush. 371, 50 Am. Dec. 793, 794, Mech. Ag., Whart., Huffc., Reinh., Tiff. Ag., 2 Gr. Ev. 123, 1 Pars. N. & B. 122, Bish., Pars., Chit., 2 Page, 975, Add. Conts. (Morgan, ed.), Rand. Com. Paper, Danl., 1 Beach, Pub. Corp. 202, 3 Suth. Dam. 797, Bigl. Lead. Cas. Torts, 22, Bigl. Fr. 58; notes, Dusenbury, 1 Am. Lead. Cas.; Mech. Ag., Whart. Ag.; Cole, 34 Neb. 68, 33 Am. St. 616, n. (oral evidence inadmissible, as in Sturdivant, *supra*). Brown: 54.

Agent is not directly liable on the instrument *ex contractu*, but is liable in case *ex delicto*, or for breach of warranty, or for money had and received. *Jefts;* Whart. Ag. 524, 532; notes, 50 Am. Dec. 793; Mech. Ag. 549: cases. See MALICIOUS ACTS. *Contra, Stackpole v. Arnold* (1814), 11 Mass. 27-29, 6 Am. Dec. 150: cited, Ans. Conts., Mech., Sto., Whart., Reinh., Rand., Danl., Pars., Com. Paper (agent failing to bind his principal binds himself, and he may be sued directly on the instrument).

Leading Cases.—

411. POLHILL v. WALTER (1832), 3 Barn. & Adol. 114 (23 E. C. L. R.), 2 Smith, Torts, 495, Bro. Max. 791, 796, Bigl. Lead. Cas. Torts, 37, Ans. Conts. 138, 350, Keener, Sel. Cas. 771, Finch, Cas. 159, Add. Torts, 495, Smith, Pars., Bish., Chit., Add., Whart. 214, 236, Clark, Sto., Laws. 195, Ham. 119, Hughes' Conts., 1 Pars., N. 121, 2 Gr. Ev. 230*a*, Bish., Torts, Add. Torts, Mech. Ag., Sto., Huffc., Reinh., Tiff., Benj. Sales, Bigl. Fraud, Bisph. Eq., Pom., Rand. Com. Pap., Danl., 3 Suth. Dam. 798, Benj. Chal. Bills, 1 Mech. Sales, 856, 876, Mews' E. C. L.

Polhill stated: Agency; warrant of authority; fraud; deceit; privity. Walter accepted a bill for another without authority, which the payee transferred to Polhill. W. believed that his acceptance would be ratified, but it was disaffirmed, and P. sued W. in an action of deceit. *Held,* he could recover. Fraud may exist without dishonest motive. Polhill; Pasley; Ans. Conts.

An agent warrants his authority; at least that he was invested with it. Collen; Smout.

A representation made for others to act upon founds liability for all who are misled by it. Polhill; Thomas; Langridge. One is liable for the "natural, direct and probable consequences of his act." Hadley v. Baxendale; Pasley (deceit); Jenkins v. Long (misrepresentation); Williams v. Stoll (negligent signing of contracts); Angle; Young v. Grote (filling blanks); Lickbarrow; Scott v. Shepherd ("Squib Case").

412. DUSENBURY v. ELLIS (1802), 3 Johns. Cas. (N. Y.) 70, 1 Am. Lead. Cas. 751, ext. n.; Mech. 550, Sto., Whart., Huffc., Tiff., Reinh. Ag., 1 Pars. Conts. 67, 1 Chit. 313, 314, Bish. 1120, 1 Add. (Morgan, ed.) 80, Clark, 738, Sto. 249, Hughes' Conts., Rand. Com. Pap. 135, 1 Danl. 306, 2 Kent, 530, 3 Suth. Dam. 798, 1 Pars. N. 122; Baird, 132 Ill. 16, 22 Am. St. 504-514, ext. n. (liability of agent *ex contractu* and *ex delicto*); Jenkins, 13 Adol. & El. (N. S.) 751 (66 E. C. L. R.), Mews' E. C. L., Nicholls, 9 Exch. 154, Mews' E. C. L.

Agency; commercial paper. If one makes a note for another without authority, he binds himself upon the note and may be sued upon it. Dusenbury; Bish. Conts. 1120. Or any other contract. Dale, 48 Ark. 188, 3 Am. St. 224. The name of the principal is surplusage. *Ut res magis valeat,* etc., is applied. Note 1, L. ed. (U. S. R.) 649; Patrick. *Contra:* Kansas, 62 Kan. 692, 84 Am. St. 417.

An agent failing to bind his principal does not bind himself, when there is no deception, but a *bona fide* mistake of fact, as in *Smout,* where the principal had lately died and neither party knew of the death. And we have already seen that a public agent is not so bound, in the absence of intent. Personal liability of persons acting as corporations but without authority. Rutherford, 22 Or. 218, 29 Am. St. 596-603, ext. n.

Oral evidence is inadmissible to make commercial paper certain. The principal must be disclosed. Means, 32 Ind. 87, 2 Am. Rep. 330-333: cases; Burlingame, 79 Ill. 515, 22 Am. Rep. 177-180, n.; 1 Rand. Com. Paper, 129, 131, 137, 147; Byles on Bills, 37, 38, 1 Danl. 285, 286, Chit. Bills, 43, Edwards, B. 71, 1 Pars. N. 92, Sto. N. 65, 68; Falk, 127 U. S. 596-607: cases.

Leading Cases.—412. Dusenbury.

An agent must disclose principal's name in sealed instrument. Elwell v. Shaw; McDonough, 1 Har. & John. (Md.) 156, 2 Am. Dec. 510, 518, ext. n.; Briggs, 64 N. Y. 357, 21 Am. Rep. 617; Mech. Ag. 419, 421, 430.

A general agent should sign in this form: "A. B. by C. D." Note, 52 Am. Dec. 775; Stackpole v. Arnold (1814), 11 Mass. 27, 29, 6 Am. Dec. 158; Sto. Ag. 147, Mech. Ag. 431, 449, Ans. Conts. 334, Whart. Ag., Rand. Com. Paper, Danl. Nego. Insts., Pars. N. & B.

Oral evidence inadmissible; words descriptio personæ cannot be explained by oral evidence. Falk, 127 U. S. 596-607; Sturdivant.

Pleadings. Parties suing in a representative capacity should aver this fact in body of pleading. Bliss, Pl., § 145; Rich, 64 Vt. 408, 15 L. R. A. 850: cases.

A more liberal rule is recognized in admitting oral evidence in simple contracts, if not commercial paper. Thomson: 342; Smith, L. C. ext. n. to those cases. *Certainty essential for commercial paper.* Kelley: 304.

Agency. Words *descriptio personarum* added after a signature, such as "Agent," "Trustee," "President," "Executor," "Administrator," are surplusage. Sturdivant; Jefts; Pentz v. Stanton; Am. Lead. Cas., with notes; Stone, 7 Cow. 453, 17 Am. Dec. 529; Sto. Ag., Whart., 1 Pars. Conts. 66, 67. *Contra,* Hager, 4 Colo. 90, 94. Effect of writings in favor of "trustee." Central Bank, 111 Iowa, 187, 82 Am. St. 511-524.

413. MOLTON v. CAMBOUX (1848), 2 Exch. 487; affirmed, 4 Exch. 19, Ewell, L. C. Inf., etc., 76 R. R. 664, Pars. Conts. 423, 424, 3 *id.* 413, Ans. 116, 2 Beach, 1407, 1 Add. 192, Chit., Bish. 970, 1 Sto. 228, Smith, 359, Whart., Laws. 162, Ham. 192, Keener, Cas. Conts. 553-556, 2 Page, 901, Hughes' Conts., Reinh. Ag., 6 Rul. Cas. 719, n., Mews' E. C. L., Flach, 88 Md. 308, 71 Am. St. 418, 42 L. R. A. 745; Young, 48 N. H. 133, 97 Am. Dec. 594; 2 Kent, 451, Mech. Ag. 48, 1 Rand. Com. Pap. 256, 257, 262, 1 Danl. 210, 214, Bro. Max. 297, 1 Wash. R. P. 455, Dev. Deeds, 352, 2 Whart. Ev. 931, 1 Perry, Trusts, 189, 1 Best, Ev. 197, 2 *id.* 529, 1 Benj. Sales, 32, Adams, Eq. 183.

Cited, §§ 282, 304, Gr. & Rud.

Molton stated: Non compos mentis persons; executed contracts of insane persons; when rescindable. Where a person apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and *bona fide,* and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties in *statu quo,* such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him. Therefore

Leading Cases.—413. Molton.

where a lunatic purchased certain annuities for life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of the affairs of human life, and fair and *bona fide* on the part of society, *held*, that after the death of the lunatic his personal representatives could not recover back the premiums paid for the annuities. The grantee of an annuity cannot take advantage of the want of enrollment of a memorial as required by 53 Geo. III., c. 141.

Ewell, L. C. Inf., etc., 614; Mitchell; Baxter; Beverley; Flach, 88 Md. 368, 42 L. R. A. 745-749, n., 71 Am. St. 418; Ætna Life Ins. Co., 154 Ind. 370, 77 Am. St. 481, n.; Woodley, 114 Ga. 122, 88 Am. St. 22, n. (deed of insane person voidable only); Whart. Conts. 98-124; Allis, 6 Met. 415, 39 Am. Dec. 744; Yates, 2 Strange, 1104.; Mews' E. C. L.; Chit. Conts.; Neill, 9 Vesey, Jr. 478, 32 Eng. Rep. 687, Mews' E. C. L., 1 Chit. Conts. 190. Beverley, 20 Grat. 147; Samuel, 3 Leigh, 567; Sims, 121 N. C. 297, 40 L. R. A. 727-748, ext. n. (marriage contract of insane person void).

Deeds of the insane voidable only. Dexter, 15 Wall. 9, stated and followed. Williams, 94 Tex. 430, 435.

Contracts with, fraudulent. Helberg, 150 Ill. 12, 41 Am. St. 339, n.; Chesterfield.

Testamentary capacity, how affected by. Miller, 179 Pa. 645, 39 L. R. A. 220-230, ext. n.; 16 Rul. Cas. 713, n.; Ayrey, 2 Add. Ecc. 206, Ew. L. C. 746.

Drunkenness, when a defense. Gore: Beverley's.

Insane persons cannot contract; their contracts are void. Walker v. Winn, 142 Ala. 560, 110 Am. St. 50-52: cases; 140 N. C. 163, 111 Am. St. 827-843, n.

Total mental incapacity precludes contract. Whart. Conts. 98. Except for necessaries the tendency is to the general rule. Wherever there is capacity there is liability, Chesterfield, but if the party contracting has notice the contract is voidable. Whart. Conts. 102. A fair beneficial contract binds. Whart. Conts. 106. Deeds of lunatics void. Whart. Conts. 107. As with infants, a party contracting with a lunatic is bound, but the lunatic is not. Formerly no one could stultify himself. This was Coke's rule in Beverley's Case. It was against reason and good morals. 1 Whart. Conts. 99.

Inquisition of lunacy and of drunkenness is only *prima facie* evidence. Whart. Conts. 123.

414. BAGSTER (or BAXTER) v. PORTSMOUTH (1826), 7 Dowl. & Ryland, 614 (16 E. C. L. R.), 2 Car. & Payne, 178 (12 E. C. L. R.), 5 Barn. & Cress. 170 (11 E. C. L. R.) Ewell, L. C. Inf., 632, Pars. Conts., Chit., 1 Add. 192, Whart. 118, Smith, 357, 360, Sto. 80, 82, Laws. 163, 2 Beach, 1407, Hughes, Laws., 1 Rand. Com. Pap. 256-258, 1 Danl. 218, 1 Pars. N. 149, 2 Gr. Ev. 369, 2 Kent, 451, Whart Ag., 374, 1 Sto. 225, 227, 228, 297, Dev. Deeds, 352, 1 Benj. Sales, 32, 1 Mech. 84, Mews' E. C. L. 82.

Bagster stated: P., of unsound mind, after

Leading Cases.—414. Bagster.

A. D. 1818, hired livery turnouts of B., who did not know of P.'s deficiency. P. used the turnouts, and they were suitable to his rank and station. In 1823 a commission found that P. had been of unsound mind since 1809. *Held*, that B. could recover.

Lunatics may sometimes contract. Molton; Mitchell; 2 Beach, Conts. 1378-1414.

415. MITCHELL v. KINGMAN (1827), 5 Pick. 451, Ewell, L. C. Inf., 522, Pars. Conts. 421, 2 *id.* 670, 1 Chit. 187, 2 *id.* 1050, Smith, 356, Whart. 100, 109, Clark, 267, Sto. 81, 87, Laws. 161, Hughes' Conts., 1 Perry, Trusts, 33, 2 Kent, 451, 1 Wash. R. P. 455, 2 Gr. Ev. 135, 370.

Mitchell stated: K. was sued upon a note. In defense, it was shown that at the time he gave the note and ever since he was a lunatic. *Held*, that under the modern rule one may stultify himself. *Nemo allegans suam turpitudinem audiendus est.* 1 Gr. Ev. 383, Ham. Conts. 185; Shelley v. Walton.

Lunatics; contracts of, voidable. Bagster, U. S. v. Drew; Molton; Jackson, 4 Cowen, 207, 15 Am. Dec. 354-369, n.

Infants; contracts with. See INFANTS. Craig, 18 Am. St. 569, ext. n.; Zouch (deed voidable on attaining majority, unless he then ratifies it). See Trueblood, 65 Am. Dec. 656. INFANTS.

416. BEVERLY'S CASE (1604), 2 Coke, 568, 4 Coke, 123*b*; Ewell, L. C. 526, 16 Rul. Cas. 702, n., 107 Am. St. 532, Pars. Conts. 421, 1 Chit. 187, 188, Ham. 185, 191, Whart. 115, Clark, 264, 272, Sto. 73, 78, Hughes' Conts.; Flach Co., Bish. C. L., 1 Rand. Com. Pap. 257, Sto. Eq., 2 Crim. Def., Dev. Deeds, 67, 69, 1 Perry, Trusts, 191, Best Ev. 308, 4 Kent, 451, Mews' E. C. L. 587, 2 Page, 895. Cited, §§ 13, 18, Gr. & Rud.

Drunkenness as a defense in crime. U. S. v. Drew. As a defense to an action on contract. 1 Chit. Conts. 192, Hughes' Conts., 1 Add. Conts, *sub*, U. S. v. Drew. No excuse for crime. 1 Bish. C. L. 400. Supplies malice in homicide. 1 Bish. C. L. 401. For what purpose may be shown in evidence. Hopt v. P. (1882), 104 U. S. 631, n.; Warner v. S. (1894), 56 N. J. L. 686, 44 Am. St. 415. Reduces degree of crime, when. 2 Crim. Def. 432-768: cases, 36 L. R. A. 465-485, n.

Morphinism and other addictions as affecting responsibility and capacity. Edwards v. S., 38 Tex. Cr. 386, 30 L. R. A. 262-266, n.; M'Naghten's Case: 195; U. S. v. Drew: cases.

What are insane delusions. Buchanan (1900), 29 Cal. 330, 50 L. R. A. 378, n.

Insane persons; power to contract. Molton; Mitchell; Bagster; Flach Case, *supra*.

Gore v. Gibson (1845), 13 M. & W. 623, 67 R. R. 762, Ewell, L. C. Inf. 734, Mews' E. C. L., *q. v.*, 1 Pars. Conts. 421, 2 *id.* 421-423, 3 *id.* 413, Bish. 980, 1 Chit. 192, 195, Smith, 364, Whart. Conts. 109, 119-121, Ham. Conts. 183, 189, 1 Add. Conts. 191, 2 Page, 903-910; 107 Am. St. 532, 21 Am. Rep. 32, Bisph. Eq. 230, 1 Sto. 230, Dev. Deeds, 80, 2 Whart. Ev. 1077, 2 Gr. Ev. 14, 1 Perry, Trusts, 191, 2 Best, Ev. 529, Benj. Sales, 32, Adams, Eq. 183,

Leading Cases.—416. Beverly's.

n.; *Lancaster County Bk. v. Moore* (1875), 78 Pa. 407, 21 Am. Rep. 24-35, ext. n.; Barrett, 2 Aik. 167, Ewell, L. C. Inf. 228, n.; Brandon, 3 C. & P. 440 (14 E. C. L. R.), Mews' E. C. L. (Contract—Parties to) (one cannot induce drunkenness and then take advantage of it); Harvey, 1 Munf. (Va.) 518, 1 Mech. Sales, 84; cited, § 55, Hughes' Conts.

Drunkenness as a defense to a contract. Gore, *supra;* Wright, 127 Ala. 557, 54 L. R. A. 440-453, ext. n.; Reynolds, 24 Tex. 174, Sto. Conts. 45; Burnham, 119 Wis.

Leading Cases.—416. Beverly's.

509; Johnson v. Harmon (1876), 94 U. S. 371, Cameron Co., 138 N. C. 365, 107 Am. St. 532-547, ext. n., citing, Beverley; Gore.

Judgment against lunatics, effect of. Pollock, 13 Wash. 626, 52 Am. St. 66; Spurlock, 19 Ky. L. Rep. 1321, 39 L. R. A. 775, ext. n.

Insanity no defense for a tort. Morse v. Crawford (1845), 17 Vt. 499, 44 Am. Dec. 349, Ew. L. C. 335; Krom. Insane persons, like infants, are liable for torts. Gilson.

For convenience the following table of cases is added, each of which will be found in its alphabetical place according to its initial letter in the Grounds and Rudiments of law referred to in the preface:

417. ANGLE v. CHICAGO M. & ST. P. R. R.: One is accountable for his fraudulent acquisition.

Angle v. Northwestern Mutual Ins. Co.: Holder of commercial paper may by implication fill blanks left in it. Piper v. Hoard, *sub,* Ashby; Hibblewhite.

Bailey v. De Crespigny: Impossibility when a defense. *Actus Dei,* etc.; Cutter: 308.

Barbier v. Connolly: Police power; limitations. Beer Co. v. Massachusetts; Millett v. P.

Batty v. Carswell: General and special agents; distinctions.

Beard v. Hopkinsville: Limitations of indebtedness by constitutions. Hitchcock v. Galveston. *Ultra vires.*

Bell v. Twilight: Possession taken and held under a contract giving notice of that contract only, and not of a changed or altered right. Brown v. Williamson; Le Neve v. Le Neve.

Bennett v. Lockwood: Damages by willful and malicious acts recoverable. See Hadley v. Baxendale.

Bentley v. Vilmont: Stolen property may be recovered by its owner anywhere. A thief gives no title.

Boydell v. Drummond: A contract may appear from several documents—writings.

Bright v. Boyd: Rights of a trespasser building on another's land; confusion and accession. Jewett v. Dringer.

Bull v. Griswold: A trespasser cannot claim or plead the benefits of his trespass; a contract cannot be forced upon parties.

Carter v. Boehm; Marine insurance; concealment of a material fact; effect is to vitiate the contract absolutely.

Cherry v. C. & A. R. R.: Ticket contracts how construed. LeBlanche. Loftis.

Chesterfield v. Janssen: Catching bargains; undue influence.

Christmas v. Oliver: Deeds; recitals in; mutuality. Both sides are bound by. Young v. Raincock.

Clark v. Des Moines: One dealing with a general agent must take notice of his powers.

Clayton v. Blakey: Renewal of leases by holding over under the Statute of Frauds.

Collins v. Blantern: Compounding crime.

Cooch v. Goodman: Construction of deeds.

Cooper Manufacturing Co. v. Ferguson: Foreign corporations; power to do business.

Craig v. Van Bebber: Infants; capacity to contract. See INFANTS: cases; Peters v. Fleming.

Craker (or Croaker) v. Chicago R. R.: Liability of corporations for torts. U. S. Bank, *sub,* McManus.

Dering v. Winchelsea: Subrogation; doctrines of; contribution.

Dumpor's Case: Conditions; in leases, if once waived, they are gone forever.

Elwell v. Shaw: Deeds; certainty of, required; technical doctrines.

Elwes v. Mawe: Fixtures; what are; doctrines.

Farwell v. Boston, etc. R. R.: Agency; fellow-servants; liability of master for injuries to.

Field v. Mayor of New York: Assignments; doctrines; what may be assigned, 84. Defenses not pleaded are waived.

French v. Miller: Procedure in courts not a subject of contract.

Gibson v. Warden: Seals; when surplusage.

Godsall v. Boldero: Insurable interest; what is.

Gordon v. Gordon: Mistake; *Ignorantia legis neminem excusat.*

Griswold v. Waddington: Aliens; contracts of hostile aliens void.

Hadley v. Baxendale: Remoteness; when a defense to a contract.

Hallett v. Wylie: Tenant must pay rent for destroyed premises, when.

Heaton v. Hodges: Deeds; how construed; metes and bounds control course and distance.

Hibblewhite v. McMorrine: Filling blanks in sealed instruments; when permissible. Angle v. Northwestern Ins. Co. See ALTERATIONS; Master v. Miller.

Hill v. Boston: Municipal corporations; powers and liabilities of.

Hilliard v. Richardson: Agency; independent contractors.

Hitchcock v. Galveston: Municipal corporations; contracts of, *ultra vires;* ratification.

Leading Cases.—

Horn v. Cole: Equitable estoppel; *Allegans contraria,* etc.

Horne v. Higgins: Undue influence. See Chesterfield v. Janssen; Huguenin v. Baseley.

Horner v. Leeds: Landlord and tenant; construction of leases; tenant cannot dispute landlord's title. Willison v. Watkins.

Huguenin v. Baseley: Undue influence. See Chesterfield v. Janssen.

Hunt v. Rousmanier (8 Wheat. 174): Agency; death of principal revokes agency. Smout v. Ilberry.

Hunt v. Rousmanier (1 Pet. 1): Mistake; reformation; rescission.

Jackson v. Cleveland; Deeds; consideration of, general discussion.

Jenkins v. Long: Misrepresentation. Pasley v. Freeman; Chandelor v. Lopus: 375, 374.

Jewett v. Dringer: Accession and confusion. Bright v. Boyd.

Jones v. Rice: Compounding crime. Collins v. Blantern.

Keech v. Hall: Priority of mortgages. Moss v. Gallimore.

Keech v. Sandford: Contracts with agents; trustees and fiduciaries; validity of. Patrick v. Bowman.

Kirkwood v. Miller: Joint trespassers; who are.

Kirven v. Va. Co.: Foreign corporations, contracts of.

Langridge v. Levy: Remoteness; privity. Sale of a dangerous gun under a false warranty. Thomas v. Winchester.

Lansdowne v. Lansdowne: Mistake; relief from. Gordon v. Gordon; Brown v. Lamphear.

LeBlanche v. R. R.: Carriers' time tables are a part of the contract.

Limpus v. London General Omnibus Co.: Agents, general and special; distinctions. Batty v. Carswell, *sub,* McManus.

Lycoming v. Union: Status of *quasi*-municipal corporations.

Lyon v. Reed: "Act and operation of law"; meaning of, under the Statute of Frauds.

Lumley v. Gye: Enticing one to break a contract is actionable. Allen v. Flood.

Manby v. Scott: Married women, contracts. See HUSBAND AND WIFE.

Marriot v. Hampton: Recovery at law ends litigation: *Interest reipublicæ ut sit finis litium.*

Marzetti v. Williams: Bank is liable to drawer for refusing to pay a check drawn upon it.

Master v. Miller: Alterations; rules of.

M'Manus v. Crickett: Principal liable for the torts of the agent, when. R. v. Almon.

Merryweather v. Nixan: No contribution among wrong-doers.

Miller v. Hyde: When the title passes in a judgment of tort.

Miller v. Race: Bank notes pass like cash on delivery. Swift v. Tyson.

Millett v. P.: Police power; limitations of power to contract.

Moss v. Gallimore: When tenant must attorn to a purchaser.

Leading Cases.—

Mueller v. N. U.: An express stipulation limits assignability of contract.

Nashville Trust Co. v. Smythe: A transfer of a principal thing carries the security; sale of a note carries the security.

Osgood v. R. R.: Parties may contract as they choose if only legally. Contract may be partly valid. Pigot's case.

Overton v. Tyler: Negotiable paper is "a courier without baggage."

Patrick v. Bowman; Deceit of partners. Keech. Contracts by letter. Adams, 326.

Pa. R. R. v. Loftis: Assent to conditions in tickets not presumed. Cherry.

Peters v. Fleming: Infants; contracts for necessaries. See INFANTS.

Pigot's Case: Alterations. A contract may be partly valid. Osgood.

Pinnington v. Galland: Ways of necessity; implications.

Poulton v. London R. R.: Agency; agent cannot be authorized to commit crime.

Price v. Torrington: Shop-books; books of account; admissibility of in evidence, 213*f.*

R. v. Almon: Agency; criminal liability of principal for acts of agent. M'Manus v. Crickett.

R. v. Conde: Refusal or omission to do lawful duty and thereby causing death. R. v. Morby; R. v. Smith; U. S. v. Holmes; R. v. Clarence.

R. v. Esop; Ignorance of law is no excuse.

R. v. Morby: Homicide from neglect of duty; failure to supply necessaries. R. v. Conde.

R. v. Wheatley: Caveat emptor: Let a purchaser beware. Pasley v. Freeman: cases, 19, 375.

Roberts v. Smith, sub, Hilliard v. Richardson: Master's liability for injury to servant.

Roller v. Roller: Parents not liable to children for torts.

Ross v. Houston: Notice to the agent is notice to the principal.

Rossiter v. Rossiter: General words are limited and restrained by special: *Verba generalia restringuntur,* etc.

Ryder v. Wombwell: Necessaries; infant's contracts for. Peters v. Fleming.

St. Louis Beef Co. v. Casualty Co.: First breach of a contract is a breach of all. Cutter: 308. See INSTALLMENT.

Salt Lake v. Hollister: Municipal corporations; contracts of; *ultra vires.* Hitchcock v. Galveston.

Sasportas v. Jennings: Duress; effect on contracts.

Scott v. Shepherd ("Squib Case"): One is presumed to intend the natural, direct and probable consequences of his act. Langridge; Thomas v. Winchester; Stetson: 163; Lickbarrow: 394; Polhill: 411; Hadley.

Scott v. Tyler: Contracts in restraint of marriage are void.

Shelley's Case: Construction of deeds; words of limitation.

Smeed v. Foord: One must minimize dam-

Leading Cases.—

ages; must so act as not to augment them, *sub*, Hadley.

Smith v. Hodson: 156: Election of remedies. One may waive a tort and sue in *assumpsit*. Streatfield v. Streatfield.

Smout v. Ilberry: Death of principal revokes agency. Hunt v. Rousmanier.

Spencer's Case: Conditions; how construed; doctrines.

Squib Case. See Scott v. Shepherd.

State of Nebraska v. Distilling Co.: Monopoly; forestalling, regrating. Mitchel v. Reynolds.

Streatfield v. Streatfield: Election; doctrines of. Smith v. Hodson.

Swift v. Tyson: Commercial paper; who is a *bona fide* purchaser. Miller v. Race; Young v. Grote. Of real estate. Le Neve; Bassett: 395, 396.

Terry v. Anderson: Statute of limitations, if accrued, cannot be withdrawn: 240.

Thomas v. Winchester: Sale of poisonous drug under harmless label. Langridge v. Levy.

Tobey v. Barber: Payment; rules of. Note given for antecedent debt does not extinguish it.

Trueblood v. Trueblood: Deeds of infants void. See Craig, INFANTS.

Tucker v. Moreland: Infant's contracts, *sub*, INFANTS. Craig v. Van Bebber.

Tyler v. Pomeroy: Contract, when complete. White v. Corliss: 303.

Twyne's Case: Fraudulent conveyances.

U. P. R. R. v. Cappier: No obligation to care for one who causes his own injury.

Leading Cases.—

Van Houten v. Morse: Marriage contract; fraudulent concealment of facts. Whitworth v. Thomas.

Van Voorhis v. Brintnall: lex loci and *lex fori* of contracts.

Vasse v. Smith; Infants; contracts of. See INFANTS; Craig v. Van Bebber.

Warmstrey v. Tanfield: Assignments; law of. See ASSIGNMENTS.

Watkins v. Baird: Duress; effect of. See Sasportas v. Jennings.

Waugh v. Carver: Partners; contracts among. Participation in profits.

White v. County of Bond: Quasi-corporations—counties: limitations upon. See Hill v. Boston; cases.

Whitworth v. Thomas: Illegal contracts; rescission, right of. Van Houten v. Morse.

Williams v. Stoll: Negligent execution of a contract is no defense. Scott v. Shepherd; Swift v. Tyson.

Williamson v. Brown: Possession of real estate as notice of an occupant's right. Le Neve v. Le Neve, 396.

Willison v. Watkins: A tenant cannot dispute a landlord's title. Horner v. Leeds.

Young v. Grote: Commercial paper; *bona fide* holder; who is. "Where one of two equally innocent persons must suffer from the fraud of another, he who first trusted must first suffer." Lickbarrow: 394; Swift.

Young v. Raincock: Estoppel by deed; recitals in, conclude the parties. Christmas v. Oliver; Jackson v. Cleveland.

Zouch v. Parsons: Infants; deeds of, may be disaffirmed. See Craig v. Van Bebber.

INDEX

TO LEADING CASES AND MAXIMS

[NOTE: The organization of this work is explained in the prefatory foreword. The cases and principles therein referred to, which form the content of the work, are next indexed. The parenthesized figures are the numbers of the cases, which are indexed as sections.

It is repeated that all maxims are translated either in this index or in the table on pp. 11-14. Maxims followed by a star in this index are also found and translated in the table on pp. 11-14.]

ABANDONMENT: Of waivable matter. *See* APPELLATE PROCEDURE; WAIVER; CONSENSUS.
Of error by failing to argue it. Citizens (186).
ABATEMENT: Pleas, practice relating to. R. v. Gibson (149); Myers (150), *et seq.*
Dilatory pleadings; practice relating to. Bonesteel (151); Harkness (152); Kraner (399).
Generally may be waived. *See* CONSENSUS. *Contra* Harkness (152).
Outline citation; illustrative cases. L. C. 290-399. *See* WAIVER.
ABBREVIATIONS; FIGURES: *See* PROLIXITY.
ABEL (334): Sureties; contracts of.
AB INITIO: Trespassers, from abusing an authority. Six C. C. (165).
ABSTRACT OF RECORD: *See* APPELLATE PROCEDURE. L. C. 292-299.
Duty of appellants in relation to. McArthur (99); Conductors' (294); Hand (295).
ABSURDITIES: Excluded in construction. Huntsman (231).
Repugnant words avoid a document. Pain (107); Barnard (108).
ACCEPTANCE: Of contract must be certain. White (303), *et seq.*
Implied from acts. White (303); Welborn (388).
Must be unequivocal. Boston R. R. (331); Jordan (324).
Statute of frauds; what is under. Baldey (337).
Sales; in law of; what sufficient. Tarling (404); L. C. 404-408.
Of deeds. Welborn (388).
Commercial paper. Welborn.
Of chattels sold. Tarling (404), *et seq.*
ACCESSORIUM NON DUCIT*: *See* EXPRESSIO EORUM. § 249.
ACCESSORY: Confession of. U. S. v. Gooding (202).
ACCIDENTS: *See* ACTUS DEI; IMPOSSIBILITY.
How viewed in contract. Cutter (308), *et seq.*; Dame (308*c*); Hallett (308*d*); Robinson; Davison (310).
ACCORD AND SATISFACTION: Cumber (311).
By one defendant operates for others. Ellis (389).
ACRAMAN (406): Sales; title passes when.
ACT AND OPERATION OF LAW: Lyon (417).
ACTA EXTERIORA INDICANT INTERIORA secreta: Acts indicate the intention. Six C. C. (165).
ACTIO NON DATUR NON DAMNIFICATO: An action is not given to one who is not injured. Weltmer (268*a*).
ACTIO PERSONALIS MORITUR CUM PERsona: A personal right of action dies with the person. § 398.
ACTION AND REMEDIES: *See* UBI JUS.
ACTORE NON PROBANTE REUS ABSOLvitur*: To prove judgment and records. Clem (2*c*); Planing (2*d*); Davenport (2*f*).
A plaintiff must make *allegata et probata* certain. McArthur (99); Gibler (96).
Must preserve and produce files and records. McArthur.
The claimant of a title or right must prove it by the right record. Windsor (1); Clem (2*c*); Williamson (65); Williams (116); Thatcher (117); Walker (118); Voorhees (119); Deputron (121); Ransom (122); Harvey (123); Stout (124); Moser (125), *et seq.*
Claimant for a review must affirmatively show error. McArthur (99); L. C. 290*a*-299.
Statutory record, every presumption against. Bates (225); J'Anson (91). *See* VERBA FORTIUS; DE NON APPARENTIBUS.
P. 2; §§ 60, 99, 114, 116, 119, 121, 122, 135, 136, 157, 164, 185, 186, 207, 232, 308.
ACTOR QUIA CONTRA REGULAM, etc.: A pleader ought not to be heard who advances a proposition contrary to the rules of law. § 104.
ACTORI INCUMBIT ONUS PROBANDI.* *See* ACTORE.
ACTS INDICATE THE INTENTION. *See* ACTA EXTERIORA; Six C. C. (165).
ACTUS CURIAE NEMINEM GRABAVIT.* Dunlap (108); Cutter (308), *et seq.* § 311.
ACTUS DEI NEMINEM FACIT INJURIAM.* *See* ACCIDENT. Pp. 8, 9, §§ 211, 308, 310, 320, 332, 350, 383.
ACTUS NON FACIT REUM NISI MENS sit rea.* McNaghten (185), *et seq.*: cases. §§ 192, 194, 198, 200, 213*a*, 232, 371.
ADAMS (326): Contracts by letter.

ADDISON (343): Agency.
AD EA QUÆ FREQUENTIUS ACCIDUNT jura adaptantur: The laws are adapted to those cases which most frequently occur. § 218.
ADEQUACY: Of consideration. Bainbridge (332); Cumber (311); Thornborow (333).
ADMIRALTY: Federal judiciary assumed jurisdiction of. Genesee Chief. *See* Lange (159).
ADMISSION: *See* DENIAL, ISSUE.
Solemn judicial statements conclusive. Oscanyan (41): cases.
By demurrer. Bissell (42).
By pleading effect. Bradbury (35); Boileau (43); Bailey (44).
AD PROXIMUM ANTECEDENS**: L. C. 70.
AD QUÆSTIONEM FACTI**: Province of court and jury. Bonnell (185); S. v. Croteau (271). §§ 92, 155, 185, 271, 272, 290c.
AFFIDAVIT OF DEFENSE. *See* SHAM PLEADING.
AGENCY: *See* QUI PER ALIUM; RESPONDEAT SUPERIOR; Contracts by agents for disclosed and undisclosed principals. Thompson (342); L. C. 342-344.
Rule in deeds; principal must be named. Taintor (344).
Commercial paper, same rule as in deeds. Sturdivant (410).
Agent can not plead illegality as a defence. Brooks (370).
The fraud of the agent is the fraud of the principal. Cornfoot (385).
Misrepresentation of agents; principal when liable. Cornfoot (385).
Admissions of agents bind principal. Oscanyan (41); U. S. v. Gooding (202).
Filling blanks in documents. Angle (417); Hibblewhite (417).
Death of principal revokes agency. Hunt (417); Smout (417).
Necessaries, contracts for. Peters (417); Ryder (417); Craig (417).
One dealing with a general agent must take notice of his powers. Clark (417).
Agent on oral authority may make writing required by statute of frauds. Worrall (390).
Notice to the agent is notice to the principal. Le Neve (396); Ross (417).
Signature by agent, how sign to bind principal. Sturdivant (410).
Words *descriptio personæ*, how construed. Sturdivant (410); Dusenbury (412).
Agent warrants his authority. Polhill (411).
Agent of government; public agents not bound unless expressly named to be bound. Sturdivant (410).
General and special; distinctions. Batty (417); Sturdivant (410), *et seq.*; Limpus (417).
Independent contractors. Hilliard (417).
Fellow servants; doctrines. Farwell (417).
Partners are agents for each other. Livingston (345).
Corporations liable for acts of agents. Coggs (350), *et seq.*; Craker (417).
Cannot act in a double capacity. Keech (417).
Agent cannot be authorized to commit crime. Poulton (417).
Criminal liability of principal for act of agent. R. v. Almon (417).
AGREED CASE. *See* CERTIFICATE OF DOUBT. Waco (300).
AIDER: By pleading over. Windsor (1).
By verdict. Rushton (5); Dobson (232*a*); R. v. Goldsmith (20); Vadakin (11); Hitchcock (12); Mallinckrodt (12*a*).
Limitations of liberal construction. R. v. Goldsmith (20); Dobson (232*a*); R. v. Waters (70), *et seq.*
Illustrations. Boyd (62); Dobson (232*a*).
ALIENS: Contracts of; when valid. Griswold (417).
ALLEGANS CONTRARIA NON EST AUDIendus**: Pleadings must not be double. Bowlus (100). *See* DUPLICITY.
Nor repugnant. Pain (107).
Illustrations from procedure. Bailey (44); L. C. 290-299. *See* CONSENSUS.
P. 1, §§ 2, 9, 18, 30, 34, 42, 43, 44, 107, 156, 183, 194, 292, 297, 299, 308*a*, 326, 384, 394, 395, 410, 417.
ALLEGATA ET PROBATA: *See* FRUSTRA; DEPARTURE; VARIANCE. L. C. 135-137.
Must correspond. Rushton (5); Fish (12*c*); Bristow (135): cases; C. v. Roby (74): cases; Garland (60).
Probata cannot supply *allegata*. R. v. Wheatley (19); McLaughlin (31); Cruikshank (232); Munday (79), *et seq.*; Borkenhagen (81).
Codes peremptorilly requires. Munday (79): cases; Borkenhagen (81); L. C. and maxims; Bristow (135); Eddy (136); Perry (136*a*); Wabash (137). §§ 74*a*, 231, 135, 385.
ALLEGATIONS: *See* CONCLUSIONS OF LAW.
There must be. Windsor (1); Campbell (2-25), *et seq.*; Rushton (5); Montana (10*b*): cases; Bartlett (6); Williams (7); Clydesdale (8), *et seq.*; Sanborn (61); Boyd (62); Huntsman (231); Cruikshank (232), *et seq.*
Must be certain. Craswell (10); Thomas (10*a*). *See* VERBA FORTIUS. R. v. Wheatley (19), *et seq.*; Moore v. C. (21).
Omission of not cured by waiver. Campbell (2), *et seq.*; Rushton (5), *et seq.*; Van Leuven (14), *et seq.*; Cruikshank (232), *et seq.*; Eddy (136).
General when sufficient; what cases. J'Anson (91); Rosen (92).
Must not be repugnant. Pain (107).
Must affirmatively appear. Crepps (113).
Are requisite for validity of record, for justification defenses. Howard (166).
ALLEN v. FLOOD: *See* Lumley (417).
ALLEN v. S. (203): Impeachment of witnesses.
ALLEN v. WRIGHT (167): Arrests; Law of.
ALTERATIONS: Rules of. C. v. Kane (183); Master (417).
Filling blanks by implication. Angle (417); Hibblewhite (417).
Must be material. Pigot's (417).
ALTERIUS CIRCUMVENTIO ALII NON præbet, etc.: A deception practised upon one person does not give a cause of action to another. § 94, 96.
ALTERNATIVE: Pleadings forbidden. Pain (107).
AMBIGUA RESPONSIO CONTRA PROFERentem est accipienda: *See* VERBA FORTIUS. An ambiguous answer is to be taken against the party who offers it. §§ 82, 91, 217.
AMBIGUITAS VERBORUM LATENS**: *See* CONSTRUCTION; VERBA INTENTIONE.
AMBIGUITY: Ambiguous pleading faulty. Outram (25), *et seq.*; Lea (30), *et seq.*
AMBIGUOUS: *See* CERTAINTY. Lea (30).
AMBIGUUM PLACITUM INTERPRETARI debet contra proferentem: *Verba fortius*. An ambiguous plea ought to be interpreted against the party pleading it. §§ 5, 91, 217.

AMBULATORY: *See* CERTAINTY; CONSERVING PRINCIPLES.
Pleadings faulty. Kewaunee (29), *et seq.*
AMENDMENTS: Limitations of the right to. Walden (139).
AMICUS CURIÆ: Duties of. Campbell (2); Waco (300).
ANCIENT INSTRUMENTS: Prove themselves. C. v. Kane (183).
ANOTHER ACTION PENDING: Must be pleaded. McKyring (33).
ANSWER: Must be certain. *See* VERBA FORTIUS. Skeate (82); J'Anson (91).
Must admit or deny. Dickson (34).
APPEALS: Not allowed the state if defendant is acquitted.
APPELLATE PROCEDURE: Is one of the conserving principles. *See* PREFACE.
To support, the mandatory record is a constitutional implication. *See* MANDATORY RECORD.
"Courts of appellate jurisdiction only." Marbury (142).
Fundamental requirements to confer jurisdiction upon courts of appellate jurisdiction. *See* MANDATORY RECORD; STATUTORY RECORD; OBJECTIONS; EXCEPTIONS; MOTION FOR NEW TRIAL; ASSIGNMENT OF ERROR; JURISDICTION; CERTAINTY; WAIVER; CONSENSUS. Windsor (1), *et seq.*; Insurance (157); C. v. Kane (183); L. C. 290*a*-299.
Claimant for review must affirmatively show error. McArthur (99); Kraner (299); *See* ACTORE; STATUTORY RECORD.
Jurisdiction of "courts of appellate jurisdiction only"; constitutional limitations; conditions. Marbury (142).
Precise question submitted to lower court is a limit of jurisdiction. Marbury (142).
Error an appellate court will *sua sponte* notice, regardless of the relation of the parties named in the record, or of their wishes, or stipulations, or consent or omissions. Windsor (1), *et seq.* *See* WAIVER; CONSERVING PRINCIPLES.
Appellate courts are strictly judged by their records. Horan (85); Marbury (142); Insurance (157). *See* DICTUM; USURPATION.
The statutory record is strictly construed against an appellant. Planing Mill Co. v. Chicago (2*d*); Harris (158); Bates (225). *See* VERBA FORTIUS.
It must expressly state it contains all the evidence. Bates (225); Harris (158). *See* VERBA FORTIUS.
Prolixity in record should be avoided. C. v. Kane (183). *See* STATUTORY RECORD.
Review of abatement, dilatory matters; conditions. Harkness (152); Clyde Mattox (153); Wilson (154).
Discretion, abuse of when a subject of review. Clyde Mattox (153).
Fundamental right to statement of facts in statutory record. Wilson (154).
Waivable error must be made to appear by the statutory record and be duly excepted to. Insurance (157); Windsor (1); Kraner (299).
Best evidence required. C. v. Kane (183).
"What ought to be of record must be proved by record and by the right record." Planing (2*d*); Pennowfeski: PREFACE. C. v. Kane (183).
Certainty essential; review matter must appear from the right record. *See* CERTAINTY.
Exceptions when necessary must be specific and certain. Harvey (123); L. C. 290*a*-299.
APPLICATION OF PAYMENTS. *See* APPROPRIATION OF PAYMENTS.
Rules of observations. Field (387).
APPROPRIATION OF PAYMENTS. Rules of observations. Field (387).
APPURTENANCES. *See* ACCESSORIUM NON DUCIT; WAY.
ARGUMENT OF COUNSEL: Privilege of counsel in argument, liability for defamation. Hastings (160).
Abusive irrelevant argument material error. Brown (161).
Is waivable. Brown.
ARGUMENTATIVE PLEADINGS FAULTY. *See* CERTAINTY. Pain (107).
Will not support *res adjudicata*. Lea (30); Russell (27). *See* RES ADJUDICATA; VERBA FORTIUS.
ARMORY (180): *Omnia præsumuntur contra spoliatorem.*
ARRAIGNMENT AND PLEA: Plea must be of record. Crain v. U. S.; Hoskins (80); Munday (79).
And it must formally appear. Crain.
ARREST: Law of. *See* WARRANT. L. C. Allen (167).
General observations. Allen.
ARREST OF JUDGMENT: *See* GENERAL DEMURRER; COLLATERAL ATTACK; NON OBSTANTE VEREDICTO; MANDATORY RECORD; WAIVER; CONSERVING PRINCIPLES. Windsor (1): cases; Perez (2*e*), *et seq.*; Hitchcock (12); *et seq.*
ASHBY (273): *Ubi jus.*
ASSAULT AND BATTERY: By carrier upon passenger. Kansas City R. R. (357); M'Manus (417).
ASSENT: *See* NON HAEC; SUBROGATION.
In contract the intention general discussion. Lampleigh (301), *et seq.*: cases; Boston (320).
The request when implied or presumed. Lampleigh, *et seq.*
The promise when implied or presumed. Lampleigh, *et seq.*
Each party must understand the contract in the same sense. Cooke (321). *See* MISTAKE.
To terms and conditions in bills of lading and tickets. Hollister (354).
Non compos mentis persons; the insane, lunatics, idiots and drunken persons. Molton (413), *et seq.*
Insane persons cannot make a deed, and assume its technical obligations. Molton.
Deeds of infants void. Trueblood (417); Zouch (417); Craig (417).
ASSESSMENT. *See* TAXATION.
In taxation must be certain. Lawrence (132).
Must be aptly made. Stetson (163).
ASSESSOR: Torts of liability. Stetson (163).
Must assess. P. v. Hastings (146).
ASSIGNATUS UTITUR JURE AUCTORIS*: L. C. 394-396. P. 2, §§ 96, 278, 319, 395, 397, 398, 404.
ASSIGNMENT OF ERRORS: Statutory record depends upon. Windsor (1); Clem (2*c*); when necessary, Planing (2*d*); Perez (2*e*); L. C. 290-299; Clem (2*c*).
ASSIGNMENTS. *See* ASSIGNATUS.
What may be assigned. Field (84): cases; Bassett (395); Le Neve (396); Ryall (397); Brice (398).
Notice of assignment, when necessary. Bassett.
Volunteer paying debt of another is not subrogated. Boston (320).
Assignability may be limited by contract. Mueller (417).
Of a principal thing carries the security. Nashville (417).
ASSUMPSIT: Promise to support; essentials. Lampleigh (301).

AUBURN (9): Demurrer, rules of.
AUCTION: Sales at, when complete. Payne (307).
Bidder may retract before hammer falls. Payne.
Puffers, bids of, invalid. Payne. *See* Cooke (321); Gulick (364).
Both sides must be bound or neither. Payne; Cooke (321).
Contracts to stifle bidding void. Gulick (364).
AUDI ALTERAM PARTEM**: Discussed. Windsor (1); Pennoyer (58); Williamson (65).
Pp. 2, 4, 7, 10, 11; §§ 1, 58, 59, 65, 66, 67, 68, 69, 70, 71, 72, 79, 93, 122, 127, 183, 217, 219, 222, 225, 264, 266, 267, 268, 278, 279.
AUTHENTICATION OF PUBLIC RECORDS: C. v. Kane (183).
AUTHORITY: *See* JURISDICTION; AGENCY.
Must be pleaded. Clem (2*c*); Hopper (4); Williams (116); Tarble's (247); and proved; Clem (2*c*).
Of courts is derived from the record and the right record. Windsor (1); R. v. Wheatley (19); Mondel (77); Munday (79).
One suing in a representative capacity must so allege. Dusenbury (412).
To divest title to property must appear from the right record. Windsor (1); Williams (116); Thatcher (117); Walker (118).
AVERMENTS: *See* ALLEGATIONS; PLEADING.
BAGGAGE: Liability of carrier for. N. Y. R. R. v. Fraloff (355).
Baggage check, what it implies. N. Y. R. R.
BAILEY (44): Forensic estoppel.
BAILMENTS: Coggs (350-357).
BAINBRIDGE (332): Adequacy of consideration.
BALDEY (337): Statute of Frauds.
BANK NOTES. *See* COMMERCIAL PAPER.
Like cash pass in delivery. Miller (417).
BARNARD (108): Construction of repugnant clauses.
BARR (265): Perjury is a ground for setting aside a judgment.
BARRATY: Contracts of illegal. Holman (363).
BARRON (241): State is not bound unless it is named to be bound.
BARROW (298): Discretion in procedure.
BARTHOLOMEW (302): Gratuitous acts are no consideration.
BARTLETT (6): Pleadings must be certain.
BASSETT (395): Assignments; Priorities.
BATES (225): Statutes; Construction.
BAUERMAN (48): Party directing litigation is bound thereby.
BAXTER (414): Contracts of insane persons.
BEARDSLEY (13): Consent will not confer jurisdiction.
BEAUMONT (367): *In pari delicto* defences.
BELKNAP (260): Government as a party to suits.
BENEDICTA EST EXPOSITIO QUANDO res redimitur a destructione: Blessed is the exposition when a thing is saved from destruction. *See* UT RES. § 218.
BENIGNE FACIENDÆ SUNT INTERPRETationes chartarum ut res magis valeat quam pereat; et quælibet concessio fortissime contra donatorem interpretanda est: Liberal interpretations are to be made of deeds, so that more may stand than fall; and every grant is to be taken most strongly against the grantor. *See* UT RES; MAGIS VALEAT; BENEDICTA; CONSTRUCTION.
BENIGNE FÀCIENDÆ SUNT INTERPRETationes propter simplicitatem laicorum ut res magis valeat quam pereat; et verba intentione non e contra debent inservire: Construction should be liberal on account of the ignorance of the laity, so that the subject matter may avail rather than perish; and words must be subject to the intention, not the intention to the words. *See* VERBA INTENTIONE; CONSTRUCTION.
BEST EVIDENCE: Is required. *See* MANDATORY RECORD; "What ought to be of record"; Clem (2*c*); Ransom (122).
Rules. C. v. Kane (183).
BEVERLEY'S CASE (416): Contracts of the insane.
BILL OF EXCEPTIONS: *See* STATUTORY RECORD.
BILLS: *See* COMMERCIAL P.
BILLARD (189): Reasonable doubt.
BIRKMYR (339): Statute of frauds.
BISSELL (42): Demurrers; rules.
BLACKETT (400): Oral evidence.
BLAIR v. READING (170): Powers of judges at chambers.
BLAIR v. RIDGLEY (254): Statutes, when constitutional.
BLOOM (266): Sunday Laws. *See* DIES NON.
BOBEL (250): Title to statute.
BOILEAU (43): Pleadings as evidence.
BONA FIDE: Offers to contract must be. *See* AUCTIONS; GOOD FAITH.
Bad faith of vendee avoids sale. Fitzsimmons (384); Lickbarrow (394).
BONA FIDE PURCHASER: Lickbarrow (394); Bassett (395); Le Neve (396).
Vendee is affected by the fraud of the vendor. Fitzsimmons (384).
When protected. Lickbarrow (394); Le Neve (396).
Of commercial paper. Swift (417); Young (417); Lickbarrow (394).
Of real estate; notice from possession. Williamson (417); Le Neve (396).
Of chattels and choses in action. Bassett (395).
BONAPARTE (278): Injunctions to prevent trespass.
BONESTEEL (151): Interlocutory proceedings are not final.
BONI JUDICIS EST AMPLIARE JURISDICtionem*: §§ 274, 275, 298, 300.
BONNELL (185): Burden of proof.
BOOKS: *See* SHOP BOOKS.
When, may be read to the jury in criminal cases. S. v. Croteau (271).
BORDEN (267): *Coram non judice* proceedings.
BORKENHAGEN (81): Defences not pleaded are waived.
BOSTON ICE CO. (320): Mistake as to person contracted with.
BOSTON & MAINE R. R. (331): Acceptance of offer consummates contract.
BOWLUS (100): Pleadings must not be too broad.
BOYD (62): Aider by pleading over.
BRADBURY (35): Admissions upon the record are conclusive.
BREACH OF CONTRACT: *See* DAMAGES.
Observations, illustrations outline citation. Cutter (308), *et seq.*; Hochster; Frost; Dame.
First breach is a breach of all. St. Louis Beef Co. (417).
BREWER (296): Motion for new trial essential for a review.
BRICE (398): Rights of assignees.
BRISTOW (135): *Allegata et probata* must correspond.

BRITTAIN (50): A matter adjudicated is conclusively settled.
BRONSON (238): *Ex Post Facto* laws.
BROOKS (370): Illegality if too remote is no defence.
BROWN, EX PARTE (105): False pleadings and deception a contempt.
BROWN v. BUTCHER'S BANK (346): Names; what is a name.
BROWN v. LAMPHEAR (347): Mistake avoids a contract.
BROWN v. SPOFFORD (54): Oral evidence inadmissible to affect commercial paper.
BROWN v. SWINEFORD (161): Arguments of counsel.
BRUGGER (162): Joinder of causes.
BULKLEY (315): A part consideration will not support a promise.
BUNN (362): Wager contracts.
BURDEN OF PROOF: Bonnell (185), *et seq.* *See* ACTORE.
Commercial paper, possession implies ownership. Bonnell (185).
One relying on a law or a defence must make it appear. Virginia (285*a*). *See* DE NON APPARENTIBUS.
BURKS (217*a*): Statutes giving civil rights are strictly construed.
BUTLER (106): Causing unlawful attachment of witness a contempt.
BYRNE (209): *Res ipsa loquitur.*
CALDER (237): *Ex post facto* laws.
CALIFORNIA (270): Dead issues will not be reviewed.
CALYE'S (356): Innkeepers.
CAMPBELL v. GREER (2*a*): Pleadings indispensable; if lost must be restored.
CAMPBELL v. PORTER (2): Parties can not dispense with essential pleadings. Garland (60).
CANCELLATION OF INSTRUMENTS: *See* MISTAKE; RESCISSION; REFORMATION; L. C. 347-349.
CAROTTI (179): Continuity.
CARRIER: *See* COMMON CARRIER.
CASUS OMISSUS: Case omitted. § 236.
CATCHING BARGAINS: Thornborow (333); Chesterfield (417).
CAUSE OF ACTION: Must be stated. Campbell (2), *et seq.*; Rushton (5), *et seq.*; Mallinckrodt (12*a*), *et seq.*; Moore (21); Springer (24).
Must appear from the right record. Campbell (2); Sanborn (61); Boyd (62); Williamson (65).
Must be real and *bona fide*. S. v. Baughman (268); Weltmer (268*a*).
Elements of essential facts to aver. Lampleigh (301), *et seq.*
Essential to attract jurisdiction. Campbell (2).
Sham pleadings can not supply. Wonderly (102).
CAVEAT EMPTOR*: Mandatory record gives constructive notice; Windsor (1); Williams (116); Thatcher (117); Walker (118); Lampleigh (301).
Pp. 2, 5, 7; §§ 19, 79, 218, 375, 376, 377, 378, 379, 380, 381, 382, 383.
CERTAIN: Contracts must be. Kelly (304).
Deeds. Elwell (417).
Judgments must be. *See* JUDGMENTS.
Taxation must be. L. C. 124-134.
CERTAINTY: *See* AMBIGUITY; DUPLICITY; REPUGNANCY.
Observations. Windsor (1); Dovaston (217); J'Anson (91).
Conserving principles depend on. Campbell (2); Cruikshank (232).
Is reckoned from the conserving principles. Rushton (5); Clem (2*c*); Planing (2*d*); Davenport (2*f*); Cromwell (26), *et seq.*
All record matter must be certain to subserve the conserving principles. Windsor (1), *et seq.*; R. v. Wheatley (19).
Criminal proceedings are not more strict and technical than are civil. Wheatley. *Verba fortius.*
Necessary for *res adjudicata.* Outram (26); Cromwell (26); Russell (27); C. v. Roby (74); Guedell (74*a*); J'Anson (91); Harvey (123).
Pleadings must not be double. Bowlus (100).
Nor repugnant. Pain (107).
Each count must be perfect in itself. Haskel (101).
General statements when sufficient. J'Anson (91); Farnam (97); King (205).
To avoid scandal. Rosen (92); Whitney (112). *See* PROLIXITY. Hastings (160).
Tested by requirements of conserving principles. Pain (107). See Windsor (1); J'Anson (91).
Degree of required. Dovaston (217); Pain (107). *See* CONSERVING PRINCIPLES. Cruikshank (232).
Taxation requires. L. C. 124-134.
Technical requirements essential for protection. Lawrence (132).
Judgments must be certain. Lawrence (132).
A matter must be juridically presented before it can be judicially considered. Cruikshank (232). *See* DE NON APPARENTIBUS.
Limitations of liberal construction. Dobson (232*a*).
Contract must be certain. White (303), *et seq.*; Kelly (304), *et seq.*; Sherman (305), *et seq.*; Zaleski (306).
Commercial paper must be certain; oral evidence inadmissible to add to; technical illustrations. Sturdivant (410); Polhill (411); Dusenbury (412).
CERTIFICATE OF DOUBT: Waco (300). Observations relating to. Waco.
CERTIFICATES, OFFICIAL: Effect of in proof. C. v. Kane (183).
Can include no fact not authorized by law. C. v. Kane.
CERTIORARI: Concurrent with appeal. White (130).
CERTUM EST QUOD CERTUM REDDI POtest**: *See* CERTAINTY; PRAESENTIA CORPORIS. §§ 12*b*, 22*c*, 107, 266, 305, 334, 346.
CESSANTE RATIONE LEGIS CESSAT ipsa lex**: *See* REASON. §§ 71, 111, 183, 224, 279.
CHAMPERTY: *See* IN PARI.
Contracts of illegal. Holman (263).
CHANDELOR (374): *See* CAVEAT EMPTOR; WARRANTY SIMPLEX. See R. v. WHEATLEY (19).
CHARACTER: *See* IMPEACHMENT OF WITNESSES.
CHEATING AND FALSE PRETENSES: R. v. Wheatley (19).
CHECKS: *See* COMMERCIAL PAPER.
Refusal to pay check actionable. Marzetti (417).
CHOSE IN ACTION: When assignable. Bassett (395), *et seq.*
Bona fide purchaser of. Bassett; Lickbarrow (394).
Negligent execution of contract. Williams (417).
CHRISTIANITY: *See* MORALITY; Trist.
CIRCUMSTANTIAL EVIDENCE: Is high, certain and satisfactory. Hickory (194); R. v. Partridge (190), *et*

seq.; Dant (212). *See* PRESUMPTIONS; EVERY; RES IPSA LOQUITUR.
CITIZENS' (186): Evidence must be certain.
CIVIL RIGHTS: Cruikshank (232); Burks (217*a*); Barron (241).
CLARK (2*b*): The right record must present each material fact.
CLEM (2*c*): The right record is essential to prove a title founded thereon, or an estoppel.
CLEVES (383): Warranty—Landlord and Tenant.
CLYDE MATTOX (153): Abuse of discretion reviewable.
CLYDESDALE (8): A cause of action must be stated.
CODES: Essential requirements cannot be waived. Rushton (5).
Are construed to conform to fundamental law. Kewaunee (29).
Allegations of fact required. Green (90).
Admissions favored in construction. Dickson (34): cases; Windsor (1).
Denials must be certain. Dickson (34): cases.
Issues must be definite and certain. Dickson (34): cases.
Appear from the right record. Munday (79).
Pleadings can not be "fish, flesh or fowl." Kewaunee (29).
Repetition of matter forbidden. Sturges (111); King (205). *See* PROLIXITY.
Prolixity should be avoided. Sturges (111).
Allegata et probata must correspond. Eddy Co. (136). *See* VARIANCE; DEPARTURE.
Pleading must be certain. Kraner (299); Kewaunee (29). *See* CERTAINTY.
Sham pleadings obnoxious. Graver (103); P. v. McCumber (110). *See* SHAM PLEADINGS.
Repugnant pleadings void. Pain (107).
The record is the measure of the right, the remedy and of the exercise of power. Borkenhagen (81); McLaughlin (31).
Defences must be pleaded. Munday (79), *et seq.*; Borkenhagen (81); J'Anson (91); Field (84).
Fundamental principles govern. Windsor (1); Campbell (2): cases. J'Anson (91): cases. *See* ALLEGATA ET PROBATA; FRUSTRA. Green (90); J'Anson (91); Bristow (135); Eddy (136).
Construction of. Dovaston (217); Indianapolis (223); Borkenhagen (81).
Pleadings of are construed against the pleader. Dovaston (217).
Require sufficient pleadings. Bissell (42); J'Anson (91).
Require certain admissions or denials and issues. Boileau (43); Munday (79), *et seq.*; Borkenhagen (81), *et seq.*
Statements of claim; how made. Sturges (111).
Do not abolish technicalities that are safeguards. Eddy (136); Kraner (299).
COERCION: *See* DURESS.
COFFIN (185): One is presumed innocent until proven guilty. Bonnell (185).
COGGS (350): Bailments.
COHENS (244): Dictum.
COLLATERAL ATTACK: *See* CAVEAT EMPTOR; CONSERVING PRINCIPLES.
Observations. Windsor (1); Lampleigh (301).
Grounds of. Crepps (113); L. C. 1-24, 74-91.
Purchaser at judicial sale must take notice of mandatory record. Windsor (1); Clem (2*c*); Williamson (65); Crepps (113); L. C. 113-134.
Ground of cannot be waived. Windsor (1); Campbell (2); Clem (2*c*); Ransom (122).
Ground of general demurrer may be raised upon. Campbell (2), *et seq.*; Ransom (122); Lampleigh (301).
COLLATERAL FACTS: If inquired after answer to is conclusive. R. v. Riley (213*h*).
COLLECTOR (148): S. P. M'Culloch.
COMITY OF COURTS: Freeman (287). *See* CONSERVING PRINCIPLES; PREFACE.
Jurisdiction attaching in one court excludes all others. Freeman.
COMMERCE: Is within federal protection. Logan (249); U. S. v. Cruikshank (232).
COMMERCIAL PAPER (BILLS; NOTES): Involves the distinctive elements of contract. *See* CONTRACT; ASSIGNMENTS; NEGOTIABLE; BILLS and NOTES.
Originates from convenience, necessity, reason and requirements of the law merchant. Sturdivant (410).
Construction of; is a courier without luggage. Sturdivant (410): cases.
Must be certain. Kelly (304).
Consideration for presumed. Rann (312).
Possession of is *prima facie* evidence of ownership. Bonnell (185).
A fundamental equity underlies the law of. Lickbarrow (394). *See* ALLEGANS; EVERY.
Regularity of execution and delivery presumed. C. v. Kane (183); Bonnell (185). *See* EVERY.
Oral evidence inadmissable to affect. *See* ORAL EVIDENCE. Sturdivant (410).
Great cases: Swift (417); Miller (417); Sturdivant (410); Lickbarrow (394).
COMMON CARRIER: L. C. 350-357.
Liability of as an insurer. Whitney (112).
COMMON LAW: English adopted in American States. S. v. Moore (222*a*.)
Dominates construction. C. v. Hess (215).
COMMON LAW RECORD: *See* MANDATORY RECORD.
C. v. BEAN (226): Indictments under statute. U. S. v. Gooding (202).
C. v. EASTMAN (22): Indictments must be certain.
C. v. GANNETT (213*g*): General reputation as proof. C. v. Kane (183).
C. v. HART (227): Provisos in statutes how pleaded.
C. v. HESS (215): The common law either limits or expands statutes, and constitutions. *See* PRESCRIPTIVE CONSTITUTION.
C. v. KANE (183): Convenience, necessity, founds rules of evidence.
C. v. MACLOON (172): Jurisdiction of crime.
C. v. McKIE (187): Burden of proof in criminal cases; reasonable doubt.
C. v. ROBY (74): Former jeopardy, indictment must be certain.
C. v. ROGERS (199): Criminal intent; drunkenness; sanity presumed.
C. v. YORK (197): One is presumed to intend the consequences of his act. *See* EVERY; SQUIB CASE.
COMMUNIS ERROR FACIT JUS**: *See* CONSENSUS.
Practical construction. Maher (255). *See* CONSTRUCTION.
§§ 218, 255, 285, 400.
COMPLAINT: What it must contain. *See* CODES; ALLEGATIONS.
COMPOUNDING CRIME: Contracts for; effect. Collins (417); Jones (417).

COMPROMISE: As a consideration. Cumber (311).
There must be a real *bona fide* claim. *See* CAUSE OF ACTION; MISTAKE.
COMPULSION: *See* DURESS; ASSENT; INTENT.
COMPUTATION OF TIME: Warren (243).
CONCEALMENT: *See* DECEIT.
Of a material fact; effect. Carter (417).
CONCLUSION OF LAW: Need not be pleaded. Hopper (4), *et seq.*; Mallinckrodt (12*a*), *et seq.*; Cruikshank (232), *et seq.*
Unavailing for any purpose. Hopper, *et seq.*; Hanford (86); J'Anson (91).
Is not aided. Hopper (4); Dixon (34): cases. Mallinckrodt (12*a*); Van Cleaf (17).
Will not confer jurisdiction. Hanford (86). *See* CONSERVING PRINCIPLES.
Are insufficient. Farnam (97); Crepps (113); Blair (254); Virginia (285*a*).
Insufficient for record to protect officer executing process. Howard (166).
CONCORDARE LEGES LEGIBUS*: Pp. 1, 7; §§ 74, 214, 215, 216, 222, 222*a*, 223, 224, 225.
CONDITION: *See* COVENANTS; DEEDS; LEASES.
Construction of. Spencer's (417).
CONDITIONAL SALE: *See* SALES.
CONDUCTORS (294): Appellants must affirmatively show error; rehearings confined to the same case.
CONFESSIONS: *Corpus delicti* cannot be proved by. Matthews (193).
By accomplices. U. S. v. Gooding (202).
One cannot criminate himself. *See* NEMO TENETUR.
CONFIRMATION. Judicial sales must be confirmed. Clarke (2*b*); Williamson (65).
CONFUSION AND ACCESSION: Trespasser building upon lands of another; rights of. Bright (417); Jewett (417).
CONSENSUS TOLLIT ERROREM**: *See* CONSENT; CONTRACT. The acquiescence of a party who might take advantage of an error, obviates its effect.
Illustrations: cases 290-299.
Pp. 4, 6, 7; §§ 2, 2*c*, 18, 42, 60, 62, 69, 71, 72, 83, 84, 135, 137, 142, 151, 185, 186, 194, 230, 242, 264, 290*a*, 290*c*, 292, 293, 296, 297, 299.
CONSENT: *See* CONTRACT; CONSENSUS.
Cannot confer jurisdiction of subject matter. *See* JURISDICTION. Windsor (1); Campbell (2); Perez (2); Fletcher (18); Israel (83).
Jurisdiction must appear from proper record matter. Campbell (2); People's Bank (12*d*); Beardsley (13).
CONSERVING PRINCIPLES: Enumeration of. *See* PREFACE (Datum Posts).
Dominate construction. Indianapolis (223); Bates (225); J'Anson (91); Dovaston (217); C. v. Roby (74).
Mandatory requirements for. Windsor (1).
Influence construction. Planing (2*d*); exhibit, when a part of the record. Planing.
Are the datum posts of construction. R. v. Wheatley (19). *See* PREFACE. J'Anson (91), *et seq.*
Certainty a requirement for. J'Anson; Pain (107). *See* CERTAINTY.
CONSIDERATION: L. C. 301-338. *See* EX NUDO PACTO.
And assent are the heart and vitals of a contract. *See* ASSENT; NON HAEC IN FOEDERA VENI; PRESCRIPTIVE CONSTITUTION.
Illegality. *In pari delicto*—Public policy—L. C. 358-373.
There is no wronged party before a court, who did not give a. Lampleigh (301); Bartholomew (302).
Ex nudo pacto non oritur actio, from the Roman involves an inquiry after the "cause of action." Lampleigh (301); White (317); Beaumont (367); Weltmer (268*a*); *See* MISTAKE; IMPOSSIBILITY; COMPROMISE; CAUSE OF ACTION; PACTIS; FABULA NON JUDICIUM; PRESCRIPTIVE CONSTITUTION.
Inquiry after is never foreclosed unless promise is under seal, or illegal. Collins (417). *See* MISTAKE; COMPROMISE; DEED.
A seal conclusively imports. Rann (312). *See* DEED.
Commercial paper *prima facie* imports. Rann (312); Lampleigh (300).
Must be alleged in pleading all simple contracts, except commercial paper. Rann (312); Lampleigh (312).
And affirmatively proved. Rann (312). *See* DE NON APPARENTIBUS.
Must move at the time of the request or after the request else it is a gratuity, and no cause of action. Lampleigh (301); Bartholomew (302); Cook (314); Bulkley (315); Mills.
Pleading of contract must allege the technical essentials for protection. Lampleigh (301). *See* PRESCRIPTIVE CONSTITUTION.
Convenience and necessity dispenses with allegations and proofs on deeds, and commercial paper. Rann (312); C. v. Kane (183). *See* SALUS; PROLIXITY.
Protection requires allegations and proof of. *See* ACTORE; PRESCRIPTIVE CONSTITUTION; CAUSE OF ACTION; ALLEGATIONS.
Facts not conclusions must be pleaded. *See* FACTS; CONCLUSIONS.
"At instance and request," allegation of. Lampleigh (301).
It is no consideration to do a part of all that which one has already bound himself to do. Cumber (311), *et seq.*; Stilk (313). *See* ACCORD AND SATISFACTION.
Adequacy of is never inquired after. Cumber (311); Bainbridge (332); Thornborow (334).
Moral obligation is not; there must be the wronged party complaining. Lee (318); White (317); Cook (314), *et seq.*; Bartholomew (302).
Must be real and substantial to make the wronged party essential for a cause of action. White (317); Beaumont (367); Weltmer (268*a*).
But is is held a consideration accepted by one will support his promise to a third person. Hendrick (319); Langridge (417); Thomas—Drug (417).
Trust and confidence given by one raises an implied promise that will support a cause of action. Coggs (350).
Negligence and tortious acts can not be returned for trust and confidence given the wrongdoer. Coggs (350). *See* MALICIOUS ACTS.
A volunteer or bailee must give care and good faith for the trust and confidence reposed in him. Coggs (350). *See* NULLUS COMMODUM.
Judges must open their records and give the matter they present consideration. Clyde Mattox (153).
CONSTITUTIONALISM: *See* GOVERNMENT; CONSERVING PRINCIPLES.

Mandatory requirements. Windsor (1).
Division of state power. L. C. 142-146.
Maxims of government. *See* p. 11; Gay (138); PRESCRIPTIVE CONSTITUTION.
CONSTITUTIONAL LAW: *See* PRESCRIPTIVE CONSTITUTION.
Constitutions deal in general language; they do not deal in codes and details. Murray (219).
They are given a common law meaning. Murray (219).
Is derived from the Roman and Norman races. *See* PREFACE (DATUM POSTS); PRESCRIPTIVE CONSTITUTION. Windsor (1); Waco (300); Lange (159).
Names officials and tribunals and confers jurisdiction. Marbury (142).
Fundamental principle annexes itself by implication. *See* PRESCRIPTIVE CONSTITUTION. Trist (214), *et seq.*; C. v. Hess (215).
The prescriptive, limits or expounds the words in organic law. *See* PREFACE; PRESCRIPTIVE CONSTITUTION. Murray (219), *et seq.*
Ex post facto laws. Bronson (238).
Impairing the obligation of contracts. Bronson (238), *et seq.*
States are only bound where they are named to be bound. Barron (241).
General limitations in the federal constitution do not apply to the states. Barron.
Constitutions are construed in the light of old law. Work (242).
Rights given under defenses of. Royall (284); Kelly (285); Virginia Coupon cases (285*a*).
Imprisonment in violation of remedy. Royall.
Proceedings in violations of are *coram non judice*. Kelly (285).
Waiver of constitutional rights. Kelly (285), *et seq.*
Limitations of indebtedness by municipal corporations. Beard (417); S. v. Borden (216).
CONSTRUCTION: *See* L. C. 213-260; MAXIMS.
Of judicial records L. C. 113-134 *et seq.*
The prescriptive constitution presents the DATUM POSTS of construction. *See* PREFACE (DATUM POSTS). Waco (300).
Conserving principles of procedure depend upon. J'Anson (91); Pain (107); Bates (225); C. v. Hess (215); Bates (225); Oakley (222); Indianapolis (224); C. v. Roby (74); Bissell (42); Dovaston (217).
Observations on. Windsor (1); J'Anson (91).
Must be uniform at all stages. Windsor (1); R. v. Wheatley (19); Bissell (42); Dovaston (217).
All compacts may be valid in part and void in part. Spraigue (236); Mallan (373); Pigot's (417).
Practical; rule relating to. Noble (251); Maher (255). COMMUNIS.
Of contracts, how affected by custom. Wigglesworth (399), *et seq.*; L. C. 399-403.
Commercial paper, how construed; *Ut res magis; Verba fortius;* Sturdivant (410-412), *et seq.*
It is a courier without luggage. Dusenbury (412).
CONSTRUCTIVE NOTICE: *See* CONSERVING PRINCIPLES; CAVEAT EMPTOR.
Observation. Windsor (1); Lampleigh (301).
Fundamental requirements. Williamson (65); Clem (2*c*); Lampleigh (301).
CONTEMPORANEA EXPOSITIO EST OPTIMA et fortissima in lege**: *See* PRACTICAL CONSTRUCTION; CONSTRUCTION. §§ 218*a*, 242, 244, 251, 255, 301, 401.
CONTEMPTS: May be concurrently punished. U. S. v. Perez (69).
Sham pleadings are. Wonderly (102).
CONTINUITY: Rule of; presumption of. Carotti (179); McNaghten (195). *See* EVERY.
Aids formation of contract. Adams (326).
Constructive notice involves. Carotti (179).
CONTRACT: L. C. 301-417.
A leading subject. *See* PREFACE.
Procedure lies at the base of. Windsor (1); Lampleigh (301).
Elements: Cases 301-417.
The offer, request, assent, acceptance, 301-333.
The consideration. *Ex nudo pacto,* 301-333. *See* CONSIDERATION.
The statute of frauds. 335-341.
Certainty. 304-307, 335-341.
There must be a subject matter in existence to contract about. Kyle (348); Tarling (404). *See* MISTAKE; COMPROMISE; IMPOSSIBILITY; CAUSE OF ACTION.
Legality of subject matter. *In pari delicto,* 358-373; Osgood (417); Whitworth (417).
Parties may contract as they choose if only legally. Osgood (417); Jordan (324), *et seq.*
Contracts by agents. 342-345; Sturdivant (410), *et seq.*
Quasi or implied contracts. Cutter (308); Boston (320).
Classification of. Rann (312).
Bailments. Coggs; 350-357.
By letter. Adams (326), *et seq.*; Patrick (417).
Offer under seal is irrevocable. Ellis (389).
Technical effect of seals. Ellis.
Parties cannot contract, stipulate nor consent away the mandatory requirements of a constitutionalism. Campbell (2); Garland (60); French v. Miller (417); Peoples Bank (12*d*).
Consensus tollit errorem; limitations of. Windsor (1); *Pacta;* French (417).
Waiver; what may be stipulated or consented away. Windsor; Campbell (2); Peoples Bank (12*d*); Cruikshank (232); L. C. 290-299, *et seq.* *See* SALUS; COMMUNIS; MODUS.
Procedure; stipulations in relation to; limitations. Campbell (2); French.
Consent can not supply *allegata.* Peoples Bank (12*d*); Campbell (2); Thomas (15); *contra* cases; C. v. Roby (74).
Negotiations for; complete when. White (303); Tyler (417). *See* SALE.
CONTRIBUTION: Doctrines. Dering (417); Merryweather (417).
CONVENIENCE: Maxims: *Quod est inconveniens; Argumentum ab inconvenienti.* *See* CONSERVING PRINCIPLES.
Influences many rules of evidence. C. v. Kane (183). *See* SALUS.
Procedure affected by; illustrations. C. v. Kane: cases.
Declarations against interest rest on. Higham (213*c*), *et seq.*
Shop books, admissibility. Price (213*f*).
General reputation. C. v. Gannett (213*g*).
And necessity are influencing factors of rules of procedure. C. v. Kane (183). *See* CONSIDERATION; PRESUMPTIONS; EVERY; SALUS.

COOK (314): Consideration must move at or after the request.
COOKE (321): Both sides must be bound or neither.
COOPER (403): Custom to affect contract.
COOPER v. REYNOLDS: 10 Wallace 365; stated J'Anson (91).
COPIES: Of documents; how proved. C. v. Kane (183).
COPYRIGHT: Registration of; priorities. Le Neve (396).
CORAM JUDICE: *See* USURPATION; CORAM NON JUDICE.
Proceedings. *See* Windsor (1); Horan (85); DEBILE; MANDATORY RECORD.
Authority of courts depend upon their records. Windsor (1); Munday (79); Horan (85); Cohens (244); Bloom (266); Borden (267); Weltmer (268*a*).
Dicta of courts do not bind. Horan; Cohens (244).
Illustrations. Windsor; Horan; Harvey (123); *Debile;* Crepps (113); Piper (114), *et seq.;* Lampleigh.
CORAM NON JUDICE: Illustration. Kempe's (115); Lampleigh (301). *See* Windsor (1), *et seq.;* Crepps (113), *et seq.;* Needham (261); Starbuck (263); Ferguson (264); Bloom (266); Borden (267); S. v. Baughman (268); Weltmer (268*a*); Watkins (269); California (270).
CORNFOOT (385): The fraud of the agent is the fraud of the principal.
CORPORATE EXISTENCE: Allegation of what sufficient. Harris (229); Richardson (230).
May be waived, *contra* cases. Harris.
CORPORATIONS: Books of, how proved. C. v. Kane (183); Iverslie (46).
Foreign; power to do business. Cooper (417); Kirven (417).
Municipal. Hill (417); Hitchcock (417); Salt Lake (417). *See Quasi;* COUNTY.
Liable for torts of agents. Craker (417); M'Manus (417).
CORPUS DELICTI: The commission of a crime must be proved in felonies. Matthews (193).
CORROBORATION: Of accomplices. U. S. v. Gooding (202).
COUNSEL: Privilege of. Hastings (160).
COUNSELMAN (178): NEMO TENETUR. Crimination of witnesses.
COUNTER CLAIM; SET OFF; RECOUPment; reconvention: Mondel (77). *See* DEFENCES.
COUNTERFEITING: Possession of the fruits or means of crime is *prima facie* evidence of guilt. U. S. v. King (192).
COUNTS: Each must be perfect. Haskel (101).
When one may refer to another. Waters (70-71).
COUNTY: Can only make such contracts as statutes permit. Williams (322); White (417).
COURTS: Are bound by their records. Windsor (1), *et seq.;* Munday (79), *et seq.;* Horan (85); J'Anson (91).
Superior and inferior distinctions; Crepps (113); L. C. 113-134.
COVENANTS: Construction of. Spencer's (417).
To rebuild in lease. Hallett (308*d*).
CRASWELL (10): What is not alleged is presumed not to exist. *De non.*
CREPPS (113): Inferior and Superior Courts. Presumptions of regularity.
CRIMEN TRAHIT PERSONAM: The crime carries the person.
CRIMES: Jurisdiction of. R. v. Keyn (171); C. v. Macloon (172); R. v. Lewis (173); Mostyn (274).
From failure to discharge obligation. R. v. Conde (417); R. v. Morby (417).
CRIMINAL LAW: *See* ACTUS NON FACIT REUM.
CROMWELL (26): Elements of *res adjudicata.*
CROSS EXAMINATION OF WITNESS: Right to is fundamental. Wright (201).
CUICUNQUE ALIQUIS QUID CONCEDIT concedere videtur et id, sine quo res ipsa esse non potuit: Whoever grants a thing is supposed tacitly to grant that without which the grant itself will be of no effect. § 249.
CUILIBET IN SUA ARTE PERITO EST CREDENDUM: Credence should be given to one skilled in his profession. § 195.
CUJUS EST DOMINIUM EJUS EST PERICULUM: The risk lies upon the owner of the subject. §§ 308*d*, 404.
CUJUS EST INSTITUERE**: §§ 2*e*, 118, 123, 147, 159, 216, 233, 244, 249, 277, 298, 308.
CULPA TENET SUOS AUCTORES: A fault binds its own authors. § 394.
CUMBER (311): Accord and satisfaction, consideration.
CUSTODIA LEGIS: Property in, cannot be seized by another court. Freeman 287. §§ 107, 287.
CUSTOM AND USAGE: A custom contrary to a statute is bad. Noble (251); Maher (255).
Cannot be proved to affect contract. Wigglesworth (399-403); Vogt (324).
CUTTER (308): Entire; Installment Contracts; Breach of.
DA COSTA (361): Wager contracts.
DAMAGES: Exemplary when allowed. Wagner (290).
May be fixed, stipulated by contract. Kemble (391); Peachey (393).
Malicious acts causing, actionable. *See* MALICIOUS ACTS.
One must minimize. Smeed (417).
DAME (308*c*): Entire contract; destruction of subject matter; whose loss. Hallett (308*d*).
DANT (212): Circumstantial; sufficient evidence.
DASH (237*a*): Retrospective laws; prescriptive constitution.
DAVENPORT (2*e*): Every presumption is made against a pleader.
DAYS OF GRACE: *See* COMMERCIAL PAPER; COMPUTATION OF TIME.
DEBILE FUNDAMENTUM FALLIT OPUS*: *See* COLLATERAL ATTACK. P. 11, §§ 1, 2, 2*c*, 2*f*, 5, 12, 19, 34, 60, 74, 79, 85, 102, 107, 113, 115, 121, 132, 217, 232, 244, 264, 291, 301.
DECEIT: Pasley (375); R. v. Wheatley (19).
Liability of agent assuming authority. Polhill (411), *et seq.*
Of partners; effect. Patrick (417).
DECLARATIONS: Against interest. *See* HEARSAY. Higham (213*c*).
DEEDS: *See* ORAL EVIDENCE.
Import a consideration. Cumber (311); Rann (312); Jackson (417).
Are a class of contract. Rann (312).
Delivery; acceptance of. Welborn (388).
Technical effect of seals. Ellis (389).
How signed by agent; principal's name must be disclosed. Sturdivant (410), *et seq.*
Recitals in; effect; estoppel. Christmas (417); Young (417).

Construction. Cooch (417); Heaton (417); Shelley's (417).
Certainty required; technical doctrines. Ellwell (417); Sturdivant (410), *et seq.*
Metes and bounds control course and distance. Heaton (417). *See* PRAESENTIA CORPORIS.
Non compos mentis persons cannot make, *e. g.*, an infant. Trueblood (417); Craig (417). *See* Zouch (417); Molton (413).
DEFAMATION: Exact words must be pleaded. Rosen (92); J'Anson (91).
By counsel. Hastings (160).
DEFAULT; SETTING ASIDE: What it admits. Mondel (77).
DEFECTS: Of pleading when waived. *See* AIDER.
DEFENCE: A defence must be pleaded. Cromwell (26); McKyring (33); Borkenhagen (81), *et seq.*
Are waived unless pleaded. Borkenhagen; Virginia Coupon Cases (285*a*).
Statements of are strictly construed. Skeate (82). *See* VERBA FORTIUS, DE NON APPARENTIBUS; AMBIGUA RESPONSIO.
DEFENDANTS: Are favored. *See* FAVORABILIORES; DE NON APPARENTIBUS.
DELAY: Due administration of the laws; delays of observations. Waco (300).
DELEGATUS NON POTEST DELEGARE: A delegate or deputy cannot appoint another. Van Slyke (177). *See* JUDICE. § 309.
DELIVERY: *See* ACCEPTANCE.
Of deeds. Welborn (388).
DE MINIMIS NON CURAT LEX: The law does not concern itself about trifles. §§ 132, 183, 185, 286, 298, 302.
DEMURRER: Grounds of the general never waived. Windsor (1); Campbell (2): cases; Auburn (9); L. C. 1-25, 74-85, etc.; McAllister (3); Hopper (4); Rushton (5), *et seq.*; Lampleigh (301).
Leading rules of. Auburn (9); Bissell (42); Mallinckrodt (12*a*).
Admissions by. Bissell (42).
Functions of. Bissell.
What is waived by not demurring. Bissell (42); Mallinckrodt (12*a*).
DENIAL: *See* Dickson; Boileau (34-44). *See* ADMISSION; ISSUE; JURISDICTION.
Essential for initial. Dickson (34), *et seq.*
Admission controls denial. Dickson. *See* VERBA FORTIUS.
A plea of confession limits and controls a general denial. Dickson.
Alternative and repugnant pleadings void. Dickson; Pain (107).
Pleadings ought to be true. Dickson; Graver (103).
Facts admitted need not be proved. Dickson (34).
Pleadings are evidence. Dickson (34).
Verified answer has the effect of a witness when. Dickson.
Upon information and belief. Humphreys (38).
Must be *bona fide*. Humphreys (38); Graver (103).
Sham ineffectual. Dickson (34); Garland (40); Graver (103).
DENNETT (145): Division of state power.
DE NON APPARENTIBUS ET NON EXistentibue eadem est ratio**: Illustrated. Moore (21); Cruikshank (232).
Claimant of a right must make it appear by a proper record. Windsor (1), *et seq.*; Planing (2*d*); R. v. Wheatley (19), *et seq.*; Stubbings (49); Pennowfeski: PREFACE (DATUM POSTS).
And by sufficient description. Gibler (96); Kraner (299).
Service of process or appearance must appear of record. Pennoyer (58); Rickelson (59).
Jurisdictional facts must affirmatively appear. Campbell (2); Crepps (113).
A fundamental rule of protection. P. 11. *See* ACTORE; FRUSTRA.
Pp. 3, 6, 7; §§ 1, 2, 2*c*, 6, 7, 9, 10*a*, 20, 23, 34, 35, 42, 60, 73, 74, 79, 82, 84, 85, 86, 87, 90, 91, 114, 115, 121, 123, 127, 135, 136, 164, 183, 206, 209, 217, 224, 225, 231, 233, 264, 268, 299, 301, 308, 312.
DEPARTURE: *See* FRUSTRA; ALLEGATA ET PROBATA; EXPRESSIO UNIUS.
There shall not be a. Windsor (1); Munday (79); Borkenhagen (81); Bristow (135).
DEPUTRON (121): Inferior tribunals; records of; burden of proof.
DESCRIPTION: Of cause of action essential. *See* PLEADING; ALLEGATION; ASSIGNMENT OF ERROR; SALES; CERTAINTY. Gibler (96); Kraner (299).
DESCRIPTIO PERSONÆ WORDS: *See* STURDIVANT (410).
DICKSON (34): Denials, admissions, issues.
DICTUM: Dicta do not bind. Cohens (244); Houston (245).
A court is bound by its record. Cohens.
DIDSBURY (213): Hearsay evidence.
DIES DOMINICUS NON EST JURIDICUS*: *See* HAUSWIRTH (51); SUNDAY. S. v. Conwell (174), *et seq.* Pp. 5, 9; §§ 174, 174*a*, 369.
DIGGLE (371): Duty to abandon illegal contract.
DILATORY, ABATEMENT PLEADINGS ARE strictly judged. Kraner (299).
DIMES (176): Disinterested judge a fundamental right. *See* NEMO DEBET ESSE JUDEX.
DINEHART (279): Injunctions; practice.
DIRECTING A VERDICT: Bonnell (185); S. v. Croteau (271).
DIRECTORS OF A CORPORATION: Liability for torts. Losee (210).
DIRECTORY STATUTES: *See* STATUTES. Bates (225); Indianapolis (223).
DISCOVERY: When court will order before trial. C. v. Kane (183).
DISCRETION: As an element in procedure. Barrow (298).
Refusal to consider application for is abuse of power. Windsor (1); Clyde Mattox (153); Barrow (298).
DISJUNCTIVE: Pleadings must not be. Pain (107).
DISORDERLY HOUSES: General reputation to prove. C. v. Gannett.
DITCHBURN (359): Wager contracts.
DIVINE LAW: Influences construction. Trist (214). *See* MORALITY; SUMMA RATIONE.
DIVISION OF STATE POWER. Marbury; P. v. Maynard; P. v. Hastings; Dennett; Flournoy; L. C. 142-46; Van Slyke (177).
DIVORCE: Contracts facilitating are void. Holman (263).
DOBSON (232*a*): Limitations of liberal construction of pleadings.
DOLUS VERSATUR IN GENERALIBUS: Those who would deceive speak in generalities. *See* CONCLUSIONS OF LAW; VERBA FORTIUS. § 91.
DOMUS SUA CUIQUE EST TUTISSIMUM refugium: Every man's house is his castle. § 167.

DOVASTON (217): *Verba fortius.*
DRAYTON (213): Hearsay evidence; when admissible.
DRUNKARDS; DRUNKENNESS: When a defense to crime. P. v. Roger (198); C. v. Rogers (199).
Contracts of. Gore v. Gibson (416). *See* INSANE.
DUE ADMINISTRATION OF JUSTICE: *See* GOVERNMENT; DELAY.
DUE PROCESS OF LAW: *See* CONSTITUTIONAL LAW; AUDI; DE NON APPARENTIBUS; FRUSTRA.
A conserving principle. *See* PREFACE; Windsor (1), *et seq.;* State v. Thurstin (23); Springer (24); Outram (25); Huntsman (231); Cruikshank (232); Logan (249).
Sale of decedent's lands; requirements. Mohr (68); L. C. 113-134.
Taxation involves. Nixon (127), *et seq.*
Fundamental elements; what constitutes. Murray (219), *et seq.;* Huntsman (231); Cruikshank (232); Logan (249).
Definition; observations. Murray (219); Logan.
Power of legislature to make certain presumptions conclusive evidence. S. v. Thomas (257); S. v. Beach (258).
Fraud will vitiate. L. C. 261-270.
Guaranty of the 14 Amendments quoted. Barron (241).
DUE PROCESS OF LAW RECORD: *See* MANDATORY RECORD.
DUNLAP (108): Exemptions from arrest; service of process.
DUPLICITY: Pleading must not be double. Bolus (100).
Nor repugnant. Pain (107). *See* ALLEGANS.
DURESS: *See* ASSENT; UNDUE INFLUENCE; FRAUD; SASPORTAS (417); WATKINS (417).
DUSENBURY (412): Agent binds himself if not his principal.
DUTTON (381): Warranty of leased premises.
EASTWOOD (336): Statute of Frauds; Moral obligation is sufficient.
EDDY (136): *Allegata et probata* must correspond.
EDWARDS v. KEARZEY (286): *Ubi Jus.*
EDWARDS v. MINING CO. (282): Equity will not aid a speculator. Seabury (281).
EI INCUMBIT, etc.: The burden of the proof lies upon him who affirms, not him who denies. §§ 206, 209.
EJUSDEM GENERIS: Of the same description. Burks (217*a*). *See* NOSCITUR. §§ 19, 217*a*.
ELECTION: In equity; Streatfield (417).
ELECTION OF REMEDIES: General discussion. Smith (156). *See* ALLEGANS. An election once made is final and conclusive. Smith. Estoppel from conduct. Bailey (44). *See* ESTOPPEL. Waiving tort and suing in contract. Smith.
ELIASON (330): Letters contract by.
ELLIS (389): Release under seal effect.
ELMORE (409): Sales; Acceptance; Change of possession.
ENTIRE CONTRACTS: General discussion, observations, illustrations. Cutter (308).
EQUAL PROTECTION UNDER THE LAW: *See* CONSTITUTIONAL LAW.
EQUITABLE ESTOPPEL. Lickbarrow (394); Horn (417). *See* ALLEGANS; ESTOPPEL.
Fundamental principal supporting. Lickbarrow; Bassett (395). Le Neve (396).
EQUITABLE EXCEPTIONS TO THE STATUTE of Frauds: Oral sale of land; when enforceable. Lester (341).
EQUITY: *See* UBI JUS.
Jurisdiction of over judgments. L. C. 261-270.
Over non-residents. Penn (275).
Specific delivery of chattels. Pusey (276).
To restrain trespass. Bonaparte (278).
To restrain crime. Hamilton (280).
Injunctions; General observations relating to. Dinehart (279).
EQUITY: Suffers not a wrong without a remedy. R. R. v. Greer (283).
EQUITY ATTACHING FOR ONE PURPOSE attaches for all*: Brugger (162).
EQUIVOCAL OBJECTIONS: Are unavailing. *See* CERTAINTY; APPELLATE PROCEDURE.
EQUIVOCAL PLEADINGS: Insufficient. Pain (107).
ERROR: *See* APPELLATE PROCEDURE; EXCEPTIONS.
Must affirmatively appear. Gibler (96); Kraner (299).
ESTOPPEL:
Of record; how proved. Clem (2*c*).
Entire mandatory record essential to prove. Clem (2*c*).
Depend on certain pleadings. Outram (25), *et seq.*
Must be pleaded. Wright (28).
Are odious, and must be certain to every intent. Lea (30).
Shown from mandatory record conclusive. Dickson (34), *et seq.;* Boileau (43); Bailey (44); Iverslie (46), *et seq.*
Forensic, illustration. Bailey (44).
Four kinds of, enumeration. Bailey.
Equitable. *See* ALLEGANS. Bailey.
Of record. *See* RES ADJUDICATA; Outram (25), *et seq.* Kingston (76).
Fraud vitiates an adjudication. Kingston (76); Watkins (417).
Last estoppel prevails. Trevivan (78).
Against, sets the matter free. Pain (107).
Contract from operations of; waiving tort and suing in assumpsit. Smith (156). *See* ELECTION OF REMEDIES; QUASI CONTRACTS.
From pleadings; records. C. v. Kane (183); Bailey (44).
EVANS (360): Wager contracts.
EVERY ACT IS PRESUMED TO BE RIGHTly, regularly and validly done: *Omnia præsumuntur rite,* etc.; Clem (2*c*); Crepp (113); Hannah (128).
Execution and delivery of commercial paper presumed. C. v. Kane (183).
Presumptions of regularity will not supply jurisdictional facts. An authority must be pleaded and established. *See* AUTHORITY; JURISDICTION; Cruikshank (232): cases; Hannah (128); C. v. Kane (183).
EVERY MAN IS PRESUMED INNOCENT until he is alleged and proven guilty: Bonnell (185): cases. *See* ACTORE; SEMPER MALUM; NEMO PRAESUMITUR. Coffin v. U. S.
Morality is a ground and rudiment of law. *See* MORALITY.
EVERY MAN IS PRESUMED TO INTEND the natural, direct and probable consequences of his own voluntary act. *See* ARMORY; Squib Case (417); Stetson.
EVERY MAN IS PRESUMED TO KNOW the law. R. v. Esop; Hunt (417).
Ignorantia legis neminem excusat is a ground and rudiment of law. It is of universal application.
One must plead for himself and at his own peril. Gibler (96); Kraner (299). *See* CULPA; VOLENTI.
Litigants must make and secure sufficient

juridical matter; Windsor (1); Clem (2c); Davenport (2f). *See* ACTORE.
EVERY MAN'S HOUSE IS HIS CASTLE: *See* DOMUS SUA, etc. Semayne's lease.
EVERY ONE IS PRESUMED TO INTEND the natural, direct and probable consequences of his act: Squib Case (417); Swift (417); Young (417); Hadley (417); C. v. Rogers (199); C. v. York (197); Polhill (411); Sturdivant (410), *et seq.*; Thomas (417); Langridge (417).
Negligent execution of contract; consequences. Williams (417); Swift (417). *See* BONA FIDE PURCHASER.
This rule rests on reason, convenience and necessity, which are grounds and rudiments of law.
EVERY: Presumption is against a judgment and its foundation record offered to prove an estoppel or title to property, real or personal. Clem (2c); Windsor (1); Pennoyer (58). *See* AUTHORITY; JURISDICTION. Hannah (128).
What was not juridically presented cannot be judicially considered. Clem; Dovaston; Gibler (96).
Appellant must affirmatively show error. Gibler (96). *See* ACTORE.
EVERY: Presumption is against a pleader: *Verba fortius*, etc. Dovaston (217); Cruikshank (232); Moore (21); Harris.
This rule is applied in construing a judgment and its record above mentioned. It is most important and is most completely resumed under citations to *De non apparentibus*, etc., and its cognates.
EVERY: Presumption is against a wrongdoer: *Omnia præsumuntur contra spoliatorem.* Armory (180).
EVERY PRESUMPTION IS IN FAVOR OF the credibility of one speaking in extremities: *Nemo præsumitur ludere in extremis.* No one is presumed to trifle at the point of death. *See* RES GESTAE.
EVERY WORD MUST BE GIVEN EFFECT to if possible in construction: *See* VERBA; UT RES MAGIS VALEAT QUAM PEREAT.
EVIDENCE: *See* BURDEN OF PROOF; BEST EVIDENCE; VARIANCE; ALLEGATA ET PROBATA; "WHAT OUGHT TO BE OF RECORD"; ORAL EVIDENCE; MANDATORY RECORD; PREFACE.
Leading rules. What ought to be of record, etc. Windsor (1); Clem (2c).
Proof must be certain and affirmatively appear. Hannah (128); Citizens (186); Vaiden (155); C. v. Kane (183).
Oral evidence excluded. Iverslie (46); Wigglesworth (399-403). *See* ORAL EVIDENCE.
Pleadings are to limit issues. Dickson (34); Gay (138).
Rules of necessity, convenience, public policy; illustrations. C. v. Kane (183). *See* NECESSITY; CONVENIENCE; SALUS.
General proof; when sufficient. C. v. Kane (183).
Need not be pleaded. McCaughey (184). Exceptions. Green (90); Dinehart.
Rules from convenience, reason, necessity and the public welfare. C. v. Kane.
Presumptions, illustrations. Bonnell (185).
Province of court and jury. Bonnell.
Reasonable doubt rule. Bonnell (185); C. v. McKie (187); Billard (189).
Recent possession of the fruits of crime. R. v. Partridge (190); Phelps (191); U. S. v. King (192).
Corpus delicti, how proved. Matthews (193); Hickory (194).
Circumstantial, its weight and effect. Hickory (194).
Presumption of sanity continuity. M'Naghten's (195).
Insanity, burden of proof. M'Naghten, *et seq.*; P. v. Rogers (198); C. v. Rogers (199).
Every one is presumed to intend the natural, direct and probable consequences of his act. C. v. York (197). *See* EVERY.
Right to cross-examine is fundamental. Wright (201).
Agents, admissions of, effect. U. S. v. Gooding (202).
Impeachment of witnesses. Allen v. S.
Handwriting, how proved. Hanly (204).
Negligence, proving of. King (205). McCully (206).
Res ipsa loquitur. Stokes (207); Byrne (209); Losee (210); Kearney (211); Dant (212).
Hearsay. Didsbury (213).
System is admissible to prove intent. Strong (213a).
In criminal cases not more strict than civil. Citizens (186); Hickory (194).
Incompetent, vitiates. Shutte (291); R. v. Gibson (272).
EXAMINED COPIES: C. v. Kane (183).
EX ANTECEDENTIBUS ET CONSEQUENTIBUS fit optima interpretatio: A passage will be best interpreted by reference to that which precedes and follows it. §§ 108, 255.
EX CAUSA TURPI NON ORITUR ACTIO: From one's own wrong arises no right.
EXCEPTIO FALSI EST OMMIUM ULTIMA: A false plea is the basest of all things. *See* Dickson (34); Wonderly (103). § 103.
EXCEPTIONS: Noting of when necessary. Windsor (1); Miller (290b), *et seq.*; Shutte (291), *et seq.*
Error appearing from the mandatory record saves itself. Windsor (1); Campbell (2): cases, *et seq.*
Depend upon assignment of error and antecedent matter. Windsor (1); Campbell (2), *et seq.* *See* NEW TRIAL.
Must be specific and made certain and clear. Gibler (96). *See* ASSIGNMENT OF ERRORS. Harvey (123).
Must be prompt. Hickory (194); Harvey.
When necessary; outline citations; illustrations; L. C. (290-299). *See* APPELLATE PROCEDURE; EXCEPTIONS; WAIVER; CONSENSUS.
EX DOLO MALO NON ORITUR ACTIO*:
The prescriptive constitution protects against. *See* PRESCRIPTIVE C. §§ 22c, 51, 91, 102, 168, 185, 261, 262, 264, 267, 268, 269, 270, 301, 312, 362, 368, 370, 394, 395.
EXECUTIO JURIS NON HABET INJURIAM*: p. 4, §§ 168, 169.
EXECUTIONS: Requirements of. Savacool.
EXECUTION SALES: Depend on the validity of the record. Clem (2c).
EX FACTO JUS ORITUR*: *See* DICTUM. § 268.
EX NUDO PACTO NON ORITUR ACTIO*: L. C. 301-333. Pp. 2, 3, 6, 10; §§ 302, 311, 312, 321, 325, 332, 333, 334.
EX POST FACTO*: L. C. 237-240; Calder (237-237a); Bronson (238); Von Hoffman (239); Terry (240); p. 2.
EXPRESSIO EORUM QUÆ TACITÆ INsunt nihil operatur**: P. 6; §§ 2c, 42, 74, 147, 216, 218, 222, 225, 225a, 229, 239, 249, 273, 320, 321, 346, 355, 357, 377.
EXPRESSIO UNIUS EST EXCLUSIO ALterius**: Pp. 3, 6, 7; §§ 1, 2, 15, 29, 42, 46, 50, 52, 63, 91, 108, 115, 116, 118, 121, 122, 130, 135, 142, 144, 151, 156,

163, 174, 183, 194, 217*a*, 231, 232, 250, 279, 290*a*, 291, 299, 305, 308, 320, 322, 324*a*, 329, 334*a*, 335, 357, 410.
EX TURPI CAUSA NON ORITUR ACTIO: No cause of action arises from illegality. P. 2.
EX TURPI CONTRACTU NON ORITUR ACtio: No action arises on an immoral contract. *See* ILLEGALITY.
EX UNO DISCES OMNES*: §§ 211, 213*b*.
FABULA NON JUDICIUM: Jurisdiction depends on real facts. *See* SHAM PLEADINGS. Wonderly (102); Graver (103). §§ 24, 26, 46, 82, 87, 91, 93, 98, 102, 103, 110, 118, 142, 159, 219*a*, 263, 267, 268, 268*a*, 270, 281, 299, 308, 317, 348.
FACTA SUNT POTENTIORA VERBIS: Facts are more powerful than words. Weltmer (268*a*). *See* PRAESENTIAE CORPORIS.
FACTS: Facts, not conclusions, must be pleaded. *See* CONCLUSIONS OF LAW. Hanford (86); J'Anson (91); Crepps.
How pleaded. Green (90).
General allegations sometimes permissible. J'Anson; Rosen (92). *See* PROLIXITY.
FACTUM A JUDICE QUOD AD EJUS OFFIcium non spectat, non ratum est: An act of a judge which does not pertain to his office is of no force. § 159.
FALSA DEMONSTRATIO NON NOCET**: §§ 255, 266. *See* PRAESENTIAE CORPORIS.
FALSE IMPRISONMENT. *See* ARREST.
FALSE PLEADINGS: Wonderly (102).
FALSE PRETENSES: R. v. Wheatley (19). *See* DECEIT.
FALSUS IN UNO FALSUS IN OMNIBUS**: §§ 188, 203, 213*g*.
FARNAM (97): Aider by proof; limitations.
FAVORABILIORES REI POTIUS QUAM actores habentur*: *See* EVERY. Gibler (96); Kraner (299).
Defendants are favored. *See* ACTORE; VERBA FORTIUS. § 99.
FEDERAL GOVERNMENT: Polity of Cruikshank (232); James (233); Barron (241); Cohens (244); Martin (246); Tarble's (247); Neagle's (248); Logan.
Protects individual rights. Marbury (142).
FEDERAL PROCEDURE: *See* REMOVAL OF CAUSES.
Requires the mandatory record. Furman.
Observations. Windsor (1); Lange (159); Wood (300). *See* PREFACE.
Follows state practice in law cases. Indianapolis (223).
States cannot detract from. Neagle (248); Logan (249).
Appellate jurisdiction of federal supreme court. Logan (249).
Citation of important cases. Logan (249).
Great cases cited. Barron (241).
FEDERAL QUESTIONS: Must be presented from the mandatory record. Furman.
FELTHOUSE (325): Contract; acceptance must be of the offer made.
FERGUSON (264): Setting aside judgments for fraud.
FIELD v. HOLLAND (387): Application of payments.
FIELD v. MAYOR (84): Defences not pleaded are waived.
FISH (12*c*): *Probata* will not supply *allegata*.
FITZSIMMONS (384): Agency; fraud of the agent is the fraud of the principal.
FIUNT ENIM DE HIS (CONTRACTIBUS) scripturæ, ut, quod actum est, pereas facilius probari poterit: The ease, facility and certainty that one stipulates for in writing, should stand as proof. Pym (52). *See* CONVENIENCE.
FIXTURES: Elwes (417).
FLETCHER (18): An assessor may take advantage of his own assessment.
FLOURNOY (146): Division of State Power.
FOREIGN LAW: How proved. *See* C. v. Kane (183).
FORFEITURES: Are odious and disfavored. Sloman (393).
FORGERY: *See* SIGNATURE. Brown (346).
FORMER JEOPARDY: *See* RES ADJUDICATA. L. C. 25-30; 69-74*a*.
When it attaches. U. S. v. Perez (69); S. v. Croteau (271).
Indictment must be certain. R. v. Wheatley (19); Moore v. C. (21), *et seq.*
Must be pleaded like other Res Adjudicata defenses. U. S. v. Perez (69), *et seq.*
FORMS OF THE LAW: Windsor (1); Galpin (63). *See* TECHNICALITIES.
FOUR IDENTITIES: *See* RES ADJUDICATA.
FRAUD: Records may be set aside for. Hauswirth (51); Needham (261); L. C. (261-270).
How pleaded. J'Anson (91); Farnam.
Probata will aid *allegata* when. Farnam. *See* MANDATORY RECORD.
Judgments on false and sham pleadings invalid. Wonderly (102); Graver (103), *et seq.*; NIHIL POSSUMUS.
Jurisdiction acquired by insufficient. Dunlap (162); Harkness (152).
Process served by insufficient. Dunlap.
Auction sales. Puffing bids void. Payne.
Of shipper in order to get lower rates. Coggs (350).
Illegality of contract. *See* IN PARI. Holman (363); UNDUE INFLUENCE.
Fraudulent acquisitions; gainer liable for. Angle (417).
Concealment of facts; marriage contract; effect. Van Houten (417).
On insurance. Carter (417); Farnam.
FRAUD AND PERJURIES STATUTE OF: L. C. (332-341).
Writing required by must be perfect and complete. Goss (55); Wain (335).
How pleaded. Jordan (228).
A contract may appear from several documents. Boydell (417).
"Act and operation of law"; meaning of. Lyon (417).
FRAUDULENT CONVEYANCE: Twyne's.
FREEMAN (287): Comity; of courts; goods *custodia legis*.
FROST (308*a*): Renunciation of contract gives immediate right to sue.
FRUSTRA LEGIS AUXILIUM QUÆRIT QUI in legem committit: Vainly does he who offends against the law seek the help of the law. §§ 180, 268*a*, 308.
FRUSTRA PROBATUR QUOD PROBATUM non relevat*: A fundamental rule of protection, p. 11. Bristow (135). *See* ALLEGATA ET PROBATA. P. 2; §§ 1, 2*c*, 5, 10*a*, 12*a*, 12*c*, 60, 70, 71, 73, 74*a*, 81, 91, 97, 135, 136, 136*a*, 217, 219, 231, 232, 233, 290*b*, 291, 308.
FUNDAMENTALS: *See* DUE PROCESS OF LAW; PRESCRIPTIVE CONSTITUTION.
Principles annexed by implication; Windsor (1); Oakley (66, 222); Weaver.
FURMAN v. FURMAN (262): Relief from judgments.
FURMAN v. NICHOLS (147*a*): Mandatory record indispensable under supreme law of the land.
GALPIN, 3 Saw (63): Service by publication.
GALPIN, 18 Wall. (64): Inferior and superior tribunals.
GAMING: *See* WAGERS. L. C. 358-362.

GARLAND v. DAVIS (60): A court is bound by its record and *sua sponte* looks after and follows and obeys it, without regard to the conduct or contract of parties named thereon. Campbell (2).
GARLAND v. GAINES (40): Denials must be certain.
GARLAND v. WHOLEBAU (297): One can not change his position on appeal. *See* ALLEGANS.
GAY (138): Duty of courts to define issues.
GENERALIA SPECIALIBUS NON DEROgant: Things general do not derogate from things special.
GENERAL PROOF: When sufficient. C. v. Kane (183).
GENERAL REPUTATION: Effect of as proof. C. v. Kane (183).
GENESSEE CHIEF: Admiralty jurisdiction over inland waters.
GENTRY (88): There must be *allegata* to confer jurisdiction.
GIBBONS v. OGDEN: *See* Logan (249).
GIBBS (405): Title when it passes.
GIBLER (96): Appellant must assign error and plead for himself, present a sufficient abstract that affirmatively shows error. Kraner (299).
GOOD (358): Wager contracts.
GOOD FAITH: Offer to contract must be. Payne (307). *See* BONA FIDE; MORALITY.
GOOD WILL: Sale of. *See* RESTRAINT OF TRADE.
GORE v. GIBSON (416): Contracts of drunkards.
GOSS (55): Statute of frauds; contract must be perfect and sufficient.
GOVERNMENT: *See* CONSTITUTIONAL LAW.
Mandatory requirements of. Windsor (1).
The study of procedure is a study of. U. S. v. Cruikshank (232); *See* PREFACE (DATUM POSTS).
Protection of the individual is. Marbury.
Depends upon the judiciary. Lange (159).
As a party to suits and contracts. Hunsaker (259); Belknap (260).
GRAND TRUNK (290*c*): General objections and exceptions insufficient.
GRATUITIES and voluntary services are never a consideration. Lampleigh (301); Bartholomew (302), *et seq.*
Volunteer paying debt of another is not subrogated. Boston (320). *See* ASSIGNMENT.
GRAVER (103): False denials will avoid a judgment secured thereby.
GREEN (90): Code requirements. Conclusions of law insufficient.
GROUNDS AND RUDIMENTS OF LAW: *See* CONSTRUCTION; PUBLIC POLICY; NECESSITY; MORALITY; CONVENIENCE; REASON; MANDATORY REQUIREMENTS OF A CONSTITUTIONALISM; CONSERVING PRINCIPLES OF PROCEDURE; PRESCRIPTIVE CONSTITUTION; PREFACE (DATUM POSTS).
GUARANTY: Under statute of frauds. Birkmyr (339).
GUEDELL (74*a*): *Allegata et probata* must correspond.
GULICK (364): Puffing bids are invalid.
HABEAS CORPUS: From federal to state courts. Tarble's (247); Neagle's (248).
Unconstitutional imprisonment by state power; Federal court to release. Royall.
HALL (369): Illegality too remote for a defense.
HALLETT (308*d*): Destruction of leased premises; when tenant must rebuild.
HAMILTON (280): Injunction to restrain crime.
HAMMACK (208): *Prima facie* evidence of negligence.
HAND (295): Statutory record; abstract.
HANDWRITING: How prove; rules. C. v. Kane (183).
HANFORD (86): Conclusions of law insufficient.
HANLY (204): Handwriting; how proved. C. v. Kane (183).
HANNAH (128): Presumption of regularity; limitations.
HARKNESS (152): Service of process in wrong territory material error.
HARPER (218): Intention controls construction.
HARRIS v. BROOKS (386): Deception of surety releases him.
HARRIS v. MUSKINGUM MANUFACTURing Co. (229): Corporate existence; allegation of.
HARRIS v. S. (158): Motion in arrest must appear in the mandatory record.
HARRIS v. TYSON (380): *Caveat emptor* applies to sales of real estate.
HARVEY v. RICHARDS (32): Courts are bound by their records.
HARVEY v. TYLER (123): Inferior tribunals; important rules of appellate procedure.
HASKEL (101): Each count must be perfect in itself.
HASTINGS (160): Privilege of counsel; defamation by.
HAUSWIRTH (51): Service of process on Sunday; when void.
HEARSAY: When admissible as evidence. C. v. Kane (183).
Exceptions to rule. Strong v. S. (213*a*), *et seq.*: cases.
HENDRICK (319): Contract by one for another. *See* PRIVITY.
HE WHO SEEKS EQUITY MUST DO equity: S. P. Seabury (281). *See* MORALITY.
HE WHO WILL HAVE EQUITY DONE TO him must do equity to the same person: Weltmer (268*a*). *See* MORALITY.
HICKORY (184): Civil and criminal pleadings equally strict; circumstantial evidence is most worthy.
HIGHAM (213*c*): Declarations of third persons against interest.
HITCHCOCK (12): Motions in arrest; aider of pleadings. Verdict will not supply omitted allegation.
HOCHSTER (308*b*): Breach of contract.
HOGINS (379): Warranty; oral evidence.
HOLLISTER (354): Passengers not presumed to assent to carrier's notice.
HOLMAN (363): Illegal contracts.
HOOD (141): Prayer, when sufficient.
HOPKINS (378): *See* Hogins.
HOPPER (4): An authority must be pleaded by alleging the facts.
HORAN (85): *Coram non judice* proceeding.
HOSKINS (80): Plea of not guilty must appear from the right record.
HOUSEHOLD FIRE INS. CO. (328): Letters; contract by.
HOUSTON (245): Courts are bound by their record.
HOWARD (166): Process must be sufficient for a justification defence.
HUMPHREYS (38): Denials on information and belief; when sufficient.
HUNSAKER (259): Government as a party to suits.
HUNTSMAN (231): Limitations of legislative power to interfere with procedure. Indianapolis (223).
HURTADO (220): Elements of due process of law may be gathered from the substance. *See* PRAESENTIA CORPORIS. Indianapolis (223).
HUSBAND AND WIFE: Contracts of wife. Manby (417).
IDEM SONANS: Wiebold (98); §§ 98, 346.

ID TANTUM POSSUMUS QUOD DE JURE possemus: We can do that only which we can lawfully do. § 169.
IGNORANCE: When a defence. *See* IGNORANTIA. R. v. Esop (417).
IGNORANTIA FACTI EXCUSAT, IGNORANTIA juris non excusat: Ignorance of fact excuses, ignorance of law does not excuse. Hunt (417). §§ 114, 320, 348, 349.
IGNORANTIA JURIS NON EXCUSAT: Ignorance of the law is no excuse. § 320.
IGNORANTIA LEGIS NEMINEM EXCUSAT*: *See* MISTAKE. R. v. Esop (417); Hunt (417). §§ 107, 122, 156, 217, 273, 285*a*, 299, 375, 417.
IGNORATIS TERMINIS, IGNORATUR ET ars: Terms being unknown, the art also is unknown.
ILLEGALITY: *See* PUBLIC POLICY; IN PARI; MORALITY. Holman (363), *et seq.*
Illegality of contract is a changeable element. Note Jordan (324); N. Y. R. R. (352).
Wager contracts. Good (258), *et seq.*
When a defence. Holman (363-373).
Right to retire from illegal contract. *See* LOCUS PENITENTIAE.
As a defense to contract when too remote. Brooks (370); Hall (369).
Statutes may declare that contracts are void. Lickbarrow (394); Holman.
As a defence need not be pleaded. Holman (373). *See* SALUS.
Restraint of trade. Mitchel (372).
ILLSLEY (169): What can not be done directly can not be done indirectly.
IMMUTABLE CONSTITUTION: *See* PRESCRIPTIVE.
IMPAIRING THE OBLIGATION OF CONTRACTS; Hanford (86); Bronson (238); Virginia (285*a*); Edwards (286); Dash (237*a*). *See* PRESCRIPTIVE CONSTITUTION.
IMPEACHMENT OF WITNESSES: Allen v. S. (203). *See* FALSUS.
One can not impeach his own witness. Hickory (194). *See* ALLEGANS; INCONSISTENCY.
IMPLICATIONS: *See* EXPRESSIO EORUM. M'Culloch (147); Indianapolis (223); O'Connell (224); Bates (225), *et seq.*; S. v. Townley (225*a*).
From authority to agents. U. S. v. Gooding (202).
Contracts incorporate existing laws. Von Hoffman (239).
IMPLIED CONTRACTS: Cutter (308); Boston (320).
IMPOSSIBILITY: *See* LEX NON COGIT AD IMPOSSIBILIA. De Crespigny (417); ACTUS DEI; Taylor (310).
Sales; there must be in existence the subject of the conveyance, or sale or contract. *See* MISTAKE.
IN ÆQUALI JURE MELIOR EST CONDITIO possidentis**: *See* IN PARI. §§ 41, 395, 396.
INCIDENTS: *See* EXPRESSIO EORUM; M'Culloch (147). *See* Neagle's (148); Logan (149); S. v. Bolden (216).
A principal thing carries its incidents. Neagle's; Logan; M'Culloch.
IN CONJUNCTIVIS OPORTET UTRAMQUE partem esse veram: In conjunctives each part must be true. § 299.
INCONSISTENCY: *See* REPUGNANT; ALLEGANS; IMPEACHMENT.
INCONSISTENT: Defenses permissible; limitation. Dickson (34); Seattle (36).
Duplicity forbidden. Bowlus (100); Pain (107). *See* ALLEGANS.
INDEMNITY: Contracts effect. Lovejoy.
INDIANAPOLIS (223): Limitations of legislative power to interfere with procedure. Hurtado (220); Huntsman (231). *See* DUE PROCESS OF LAW.
INDICTMENT: *See* ALLEGATIONS; CAUSE OF ACTION; CERTAINTY.
Important rules of construction. Huntsman (231).
Reflect the law from which they are drawn with certainty. Cruikshank (232); James (233).
Must be certain. R. v. Wheatley (19), *et seq.*; Moore v. C. (21); Huntsman (231); Cruikshank (232); James (233); U. S. v. Perez (69); R. v. Waverton (70); R. v. Waters (71); R. v. Vaux (72); R. v. Vandercomb (73); C. v. Roby (74); Guedell (74*a*); R. v. O'Brien (75).
Aider by waiver limitations. R. v. Goldsmith (20); R. v. Waverton; R. v. Waters, *et seq.*; Huntsman (231), *et seq.*; Dobson (232*a*).
Like all pleadings must be certain. Campbell (2); R. v. Wheatley (19), *et seq.*; U. S. v. Perez (69), *et seq.*; Huntsman (231). *See* CONSERVING PRINCIPLES.
Certainty essential. Huntsman (231); C. v. Roby (74), *et seq.* *See* RES ADJUDICATA.
Liberal construction limits. R. v. Waters (71); Dobson (232*a*); R. v. Goldsmith (20); Rushton (5).
Limitations of legislative power to interfere with. Huntsman (231); Hurtado (220); Indianapolis (223). *See* RES ADJUDICATA; FORMER JEOPARDY.
INFANCY: *See* INFANTS.
INFANTS: Service of process on mandatory. Windsor (1); Galpin (63).
Equitable jurisdiction over. Williamson.
Contracts of. Craig (417); Peters (417); Ryder (417); Tucker (417).
Necessities, may contract for. Peters.
Deeds of, void. Trueblood (417). *See* Zouch (417).
Liable for torts. Hall (369).
INFERIOR TRIBUNALS: Jurisdiction of, how averred. Sturges (111).
General observations on. Crepps (113-134): cases.
INGALLS (353): Carriers warrant safe appliances.
IN GENERALIBUS VERSATUR ERROR: Error dwells in general expressions. Hanford (86).
INJUNCTIONS: General rules, observations. L. C. 278-283.
To restrain trespass. Bonaparte (278).
Procedure. Dinehart (279).
To restrain crime. Hamilton (280).
Party asking for must stand fair. Seabury (281).
Speculators are denied relief. Edwards.
Quia timet relief rules. R. R. v. Greer.
IN JURE NON REMOTA CAUSA, SED proxima, spectatur**: §§ 363, 370.
IN LIMINE BREACH: Of contract gives immediate right to sue. Frost (308*a*); Hochster (308*b*); Dame 308*c*); Hallett (308*d*).
INNKEEPER: Calye's Case (356).
INNOCENCE: Presumed. *See* EVERY; Bonnell (185); Coffin v. U. S.
IN PARI DELICTO POTIOR EST CONDITIO defendentis**: Defences need not be pleaded. Field (84); Holman (363); Seabury (281); Edwards (282); Weltmer (268*a*). *See* ILLEGALITY. Pp. 4, 5; §§ 41, 84, 268*a*, 281, 308, 311, 317, 320, 363, 364, 365, 366, 367, 368, 370.
IN PARI MATERIA: All provisions and enactments must be construed together. Barnard (108). § 216.
IN PRÆSENTIA MAJORIS CESSAT PO-

tentia minoris**: Fundamental law annexed by implication. Trist (214), *et seq.* §§ 35, 74*a*, 92, 142, 159, 214, 219*a*, 249, 285*a*, 308. *See* PRESCRIPTIVE.
INSANE: *Non compos mentis* persons. Molton (413).
May commit tort. Beverly (416).
INSANITY: *See* ACTUS NON FACIT.
Act and intent constitute crime. M'Naghten (95); C. v. York (197); R. v. Oxford (200).
Drunkenness when a defense to crime. P. v. Rogers (198); C. v. Rogers (199).
INSPECTION OF DOCUMENTS: Rules for. C. v. Kane (183).
INSTALMENT CONTRACTS: *See* ENTIRE CONTRACTS.
Illustrations. Cutter (308).
INSTRUCTIONS: Province of court and jury. S. v. Croteau (271); Hickory.
INSURANCE: Oral contract for, valid. White (303).
Insurable interest; what is. Godsall.
Concealment of facts; effect on policy. Carter (417).
INSURANCE CO. v. FOLSOM (157): Statutory record indispensable to present waivable error.
INTELLIGENCE: *See* IGNORANTIA.
INTENT: Act and intent essential to commit crime. M'Naghten (195), *et seq.*
Is inferred from act. C. v. York (197).
Governs in construction. Harper (218); Sloman (393); Blackett (400).
Intention overrides the letter. Maher (255). *See* VERBA INTENTIONE.
Practical construction may indicate. Maher. *See* PRAESENTIA CORPORIS.
Contract; the intention. *See* ASSENT; REQUEST. Lampleigh (301), *et seq.*
Is a fundamental requirement in crime. S. v. Bolden (216).
INTEREST REIPUBLICÆ UT SIT FINIS litium**: *See* MARRIOT (417); RES ADJUDICATA. §§ 2*e*, 76, 156, 232*a*, 417.
INTERPRETATION: *See* CONSTRUCTION.
IRREPARABLE INJURY: *See* INJUNCTION.
ISRAEL (83): Issues must appear from the right record. *See* ISSUES.
ISSUES: *See* ALLEGATION; ADMISSION; DENIAL.
Courts *sua sponte* take notice of. Garland (60); Munday (79); Crane v. U. S.; Dickson (34), *et seq.*
Must appear in mandatory record; it is irrefragable. Mondel (77); Munday (79); L. C. 77-85.
Cannot be waived. Munday (79): cases.
Plea of not guilty mandatory and must appear in the right record. Crain v. U. S.; Hoskins (82).
Judgment beyond the issue void. Reynolds (79*a*).
Duty of courts to declare and define. Gay (138); Garland (60).
Province of court and jury. *See* AD QUAESTIONEM. Bonnell (185); S. v. Croteau (271); Hickory (194).
ITA LEX SCRIPTA EST: The law is so written. §§ 216, 219*a*, 225, 255, 264.
IVERSLIE (46): Best evidence required. *See* ORAL EVIDENCE.
JAMES (233): Indictments must be certain.
J'ANSON (91): Pleas, answers and replications must be certain. (Instructive case.)
JOINDER OF CAUSES: Brugger (162).
Of criminal charges. S. v. Croteau (271).
JOINDER OF COUNTS: Brugger (162).
JOINT CONTRACTS: If alleged to be such must be proved. Bristow (135).
JOINT TRESPASSERS: Stetson (163); Lovejoy (289); Cornfoot (385).
Release of one is release of all. Ellis.
JONES (376): *Caveat emptor*—Warranty.
JORDAN v. GREENBORO FURNACE CO. (228): Statute of frauds; pleading of.
JORDAN v. NORTON (324): Proposer may prescribe time, place and terms of contract. *See* NON HAEC.
JUDGE: Immunity of. Lange (159); Crepps (113), *et seq.*; Piper (114), *et seq.*
Cannot sit in his own cause. Dimes (176). *See* NEMO DEBIT ESSE JUDEX.
Cannot delegate his authority. Van Slyke.
JUDGMENTS: *See* JURISDICTION. Windsor (1), *et seq.*
How proved to support title or estoppel of record. Clem (2*c*). *See* VERBA FORTIUS.
Depends upon mandatory record. Clem (2*c*). *See* DEBILE.
Jurisdictional facts not presumed to support. Clem (2*c*).
Essential record matter if lost must be restored. Campbell (2*a*).
Validity of depends upon jurisdiction. Windsor (1); Pennoyer (58); Ricketson (59); Williamson (65); L. C. 113-134; L. C. 261-270.
Of subject matter. Campbell (2).
Description of particular matter. Windsor; Campbell; C. v. Roby (74); Lawrence (134).
Of the person. Pennoyer (58).
An opportunity to be heard. Windsor. *See* AUDI; DE NON APPARENTIBUS; FRUSTRA PROBATUR. Oakley (66); Williamson (65).
A disinterested judge. Dimes (176). *See* NEMO DEBET ESSE JUDEX.
Territorial jurisdiction. Mostyn (274).
The mandatory record. Clem (2*c*); Boyd (63), *et seq.*; Williamson (65), *et seq.*
The record must show the authority to enter the judgment. Windsor; L. C. 1-100; L. C. 261-270.
Fraud and arbitrariness will vitiate. Windsor (1); Needham (261): cases; Oakley (66); Ferguson (264); Barr (265); Bloom (266); Borden (267); S. v. Baughman (268); Weitmer (268*a*); Watkins (279); California.
Presumptions in favor of limitations. Boyd (62); Galpin (63), *et seq.*; Williamson (65), *et seq.*; C. v. Roby (74), *et seq.*; Munday v. Vail (79), *et seq.*
Must be certain. Lawrence (134).
Is an entirety. Needham (261).
May bind parties not named in the record. Bauerman (48).
Parties refusing to defend when they should upon notice are bound by. Lovejoy (289).
As evidence to prove title or an estoppel. Clem (2*c*). *See* RES ADJUDICATA; PRESCRIPTIVE CONSTITUTION; INTEREST REIPUBLICAE.
JUDICE JUDEX DELEGATUS, etc. *See* DELEGATUS, etc.; Van Slyke (177).
JUDICIAL FUNCTIONS: Cannot be delegated. Van Slyke (177). *See* DELEGATUS; DIVISION OF STATE POWER.
Province of court and jury. S. v. Croteau (271); Hickory (194). *See* ISSUES.
JUDICIAL NOTICE: Lanfear (181); Olive (182); C. v. Kane (183).
JUDICIAL SALES: Observations of. Williamson (65).
Confirmation of. Clark (2*b*); Williamson (65).
JUDICIARY: *See* DIVISION OF STATE POWER.
JURARE EST DEUM IN TESTUM VOCARE,

et est actus divini cultus: To swear is to call God to witness, and is an act of religion. *See* MORALITY.
JURISDICTIO EST POTESTAS DE PUBLICO introducta, cum necessitate juris dicendi: Jurisdiction is a power introduced for the public good, on account of the necessity of dispensing justice.
JURISDICTION: *See* L. C. 1-100. Windsor (1); Pennoyer (58).
Elements. Windsor (1); L. C. 261-270. *See* JUDGMENTS; AUTHORITY.
Depends on record authority. Windsor (1), *et seq.;* R. v. Wheatley (19); Dickson (34); Garland (60); Munday (79); Weaver (67); Eddy (136); Huntsman (231); Cohens (244); Starbuck (263).
Is conferred by proper pleading. Sanborn (61); Eddy.
Manner of acquiring mandatory. Sanborn (61); Campbell (2), *et seq.;* Eddy.
Presumptions in favor of; limitations. Boyd (62), *et seq.;* Eddy.
Usurpation vitiates. Windsor (1); Williamson (65); Weaver (67); Piper (114); Eddy.
Defined. Munday (79); Eddy.
Depends on real *bona fide* facts. *See* FABULA. Wonderly (102); *et seq.;* S. v. Baughman (268); Eddy; Weltmer (261*a*). *See* NIHIL POSSUMUS.
Dead issues will not attract. S. v. Conklin (109); Eddy.
Of inferior courts, how averred. Sturges (111); Eddy.
Of inferior tribunals; general discussion. Crepps (113-114): cases; Eddy.
Must affirmatively appear. Crepps (113); Eddy (136). *See* DE NON.
To divest property depends upon affirmative facts shown from the right record. Clem (2*c*); Williamson (65); Crepps (113), *et seq.;* L. C. 114-134; Eddy.
Vested by a constitution cannot be divested by statute. Marbury (142); Eddy.
Of crime. R. v. Keyn (171); C. v. MacCloon (172); R. v. Lewis (173); Mostyn (274).
Of local and transitory actions. Mostyn.
Acquired by fraud invalid. Allen (167); Dunlap (168); Ilsley (169); Hauswirth (51).
Sunday courts cannot sit or act on. *See* DIES NON. S. v. Conwell (174).
Necessity will excuse the exercise of authority on Sunday. Langabier (174*a*).
Judge cannot sit in his own cause. Dimes.
Cannot delegate judicial authority. Van Slyke (177).
Territorial. Mostyn (274).
Equity over non-resident. Mostyn; Penn (275).
Equity, to set aside judgments. Needham (261), *et seq.*
Specific performance relating to chattels. Pusey (276).
JURIS PRÆCEPTA SUNT HÆC, HONESTE vivere alterum non lædere, suum cuique tribuere: These are the precepts of the law, to live honorably, to hurt nobody, to render to every one his due. *See* MAXIMS; MORALITY.
JURY: Province of in criminal cases; the jury must try. S. v. Croteau (271). *See* AD QUÆSTIONEM FACTI. R. v. Gibson (272).
JUS PUBLICUM PRIVATORUM PACTIS mutari non potest: A public right cannot be changed by agreement of private parties. § 363.
JUSTICE: *See* GOVERNMENT.
Delays of, a denial of. Waco (300).
JUSTICES OF THE PEACE: Liability of, for exercise of authority. Crepps; Piper (113-114), *et seq.*
JUSTIFICATION: Defenses, how pleaded. J'Anson (91); Savacool (164), *et seq.*
Record must be sufficient for, is a conserving principle. Howard (166).
Defenses depend upon a record. Tarble's Case (247).
Defenses must be pleaded. J'Anson (91); Virginia (285*a*).
KANSAS CITY R. R. (357): Common carrier; rights; duties; contracts of.
KEARNEY (211): *Res ipsa loquitur.*
KEECH v. SANDFORD (RUMFORD MARket Case) (417): Trustee cannot deal with trust estate. Boyd (62).
KELLEY v. HEMMINGWAY (304): Certainty of contract.
KELLEY v. BEMIS (285): Unconstitutional law is no law.
KEMBLE (391): Liquidated fixed damages; construction; *Verba intentione.*
KEMPE'S LESSEE (115): Inferior tribunals.
KEWAUNEE COUNTY (29): Functions of pleadings.
They must be certain; cannot be "fish, flesh or fowl." Lea (30).
KINGSTON (76): *Res adjudicata;* estoppel of record.
KING v. BALDWIN (334*b*): Sureties; rights, liabilities.
KING v. OREGON SHORT LINE R. R. (205): General allegations, when sufficient, in negligence. *See* Farnam.
KIRKWOOD v. MILLER: Joint trespassers. *See* STETSON (163).
KOLLOCK (Wis.): Construction of codes, *Lex non exacte.*
KRANER (299): Dilatory pleadings strictly construed. *See* VERBA FORTIUS.
KROM (N. Y.): Insane persons liable for torts (416).
KYLE (348): Mistake as to subject matter of sale or contract, avoids it.
LAMPLEIGH (301): Vitals for a contract; the request, assent, the consideration and the promise.
LANDLORD AND TENANT. *See* LEASE.
Warranty of premises; illustrations; outline; citation. Harris (380); Cleves.
Furnished apartments distinctive rule. Smith (382).
Tenant cannot dispute landlord's title. Horner (417); Williamson (417).
Conditions in leases; bond construed. Dumpor's Case (417).
LANFEAR (181): Judicial notice.
LANGABIER (174*a*): Process may be served on Sunday.
LANGE (159): Immunity of judicial officers.
LANGRIDGE v. LEVY: Contract with one for a third person. Remoteness (417).
LANSDOWNE: Mistake of law when an excuse.
LARCENY: A thief can give no title. *See* SALES.
LAWRENCE (132): Taxation proceedings must be certain.
LEA (30): Pleadings must not be ambiguous. Kewaunee.
LEASE: Covenant to rebuild. Hallett.
Renewal of by holding over. Clayton.
Conditions in; effect of waiver. Dumpor.
LEGAL CONCLUSIONS: *See* CONCLUSIONS OF LAW. Hanford (86); Howard v. S. (166).
LEGES NON VERBIS SED REBUS SUNT impositæ: Laws are imposed on things,

not words. *See* FABULA; SHAM PLEADINGS. §§ 103, 801.
LEGES POSTERIORES PRIORES CONTRARIAS abrogant*: Bronson (338).
LEGISLATIVE JOURNALS: *See* STATUTES; RECORDS.
How proved. C. v. Kane (183).
Records, of what use. Montgomery (47).
LEGISLATIVE POWER: *See* DIVISION OF STATE POWER.
Limitations of, in procedure. Windsor (1); Springer (24); Indianapolis (223). *See* PRESCRIPTIVE CONSTITUTION.
Cannot abolish certainty. Moore (21), *et seq.*; Huntsman (231).
LEGISLATURES: Acts of statutes how proved. C. v. Kane (183).
LE NEVE (396): Priorities; constructive notice from deeds of conveyance.
LESTER (341): Equitable exceptions to the statute of frauds.
LETTERS: Contracts by. Adams (326); L. C. 326-330; Patrick (417).
LEVY; SEIZURE OF PROPERTY: Justification for. Savacool (164).
In custody of another court. *See* CUSTODIA LEGIS.
LEX EST MISERA UBI JUS EST VAGUM aut incertum: It is a miserable state of things when the law is vague and uncertain. *See* PREFACE. § 219*a*.
LEX LOCI and LEX FORI. Van Voorhis.
LEX NEMINEM COGIT AD VANA SEU inutilia peragenda: The law forces no one to do vain or useless things. *See* SURPLUSAGE; REASON; CONVENIENCE; PROLIXITY. §§ 155, 161, 183, 185, 225, 285*a*, 308*d*, 311.
LEX NON COGIT AD IMPOSSIBILIA: The law requires nothing impossible. De Crespigny (417). §§ 225, 292, 320, 332.
LEX NON EXACTE DEFINIT, SED ARbitrio boni viri permittit*: Lange (159). §§ 147, 215, 216, 219*a*, 222, 225, 225*a*, 298, 341.
LIBEL AND SLANDER: *See* DEFAMATION.
Defences, how pleaded. J'Anson.
LICET DISPOSITIO DE INTERESSE FUturo sit inutilis tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu: Although the grant of a future interest be inoperative, yet a declaration precedent may be made which may take effect provided a new act intervene. § 338.
LICKBARROW (394): He who first trusted must first suffer.
LIEN: Of carriers. Lickbarrow (294).
Of vendors. Lickbarrow (294).
LIMITATIONS OF ACTIONS: Concealment of facts, effect. Farnam (97).
Demurrer will raise defence of, when. Sturges (111).
LIMITATIONS OF INDEBTEDNESS: *See* CONSTITUTIONAL LAW.
LIMPUS: *See* AGENCY.
LIQUIDATED DAMAGES: Kemble (391).
LIS PENDENS: Notice from. Le Neve (396). *See* CONSTRUCTIVE NOTICE; CAVEAT EMPTOR.
LITERATURE: Kingston's Case (76) most widely cited.
Observations upon. R. v. Wheatley (19); Pasley (375); J'Anson (91); Dovaston (217).
LIVINGSTON (345): Partners; agents for each other.
LOCUS PENITENTIÆ: Right to retire from an illegal contract. Diggle (371).
LOBBYING: Contracts void. Trist (214); Tool Co. (365).
LOEFFNER (196): Sanity; burden of proof.
LOGAN (249): *Expressio eorum.*
LOSEE (210): *Res ipsa loquitur;* negligence.
LOST DOCUMENTS: And records rule. C. v. Kane (183).
LOUGH v. OUTERBRIDGE (293): What may be waived.
LOVEJOY v. MURRAY (289): Indemnity contracts.
LOWRY (104): False pleadings give no rights. NIHIL POSSUMUS.
LUMLEY (417): Enticing one to break a contract; malicious acts.
LYON (417): "Act and operation of law"; meaning of.
MACLAY (327): Contract by letter.
MAGNA CHARTA: *See* MURRAY (219); Waco (300).
MAHASKA (213*d*): Hearsay evidence.
MAHER (255): Practical construction.
MAINTENANCE: Contracts of, illegal. Holman (363).
MALEDICTA EXPOSITIO QUÆ CORRUMpit textum: An evil exposition corrupts the text. *See* BENEDICTA.
MALICE: *See* INTENT; GUILTY KNOWLEDGE; MALUM.
MALICIOUS ABUSE OF PROCESS: Savacool (164).
MALICIOUS ACTS: Causing damage actionable. Cornfoot (385); Bennett.
Enticing one to break a contract, is actionable. Lumley (417).
Refusal to pay bank check. Marzetti (417).
MALLAN (373): *In pari* contracts; restraint of trade.
MALLINCKRODT (12*a*): The general demurrer is never waived.
MALUM NON PRÆSUMITUR*: *See* EVERY.
MANDATORY RECORD: What ought to be of record must be proved by record and by the right record is a conserving principle of procedure. *See* PREFACE; Huntsman (231); C. v. Roby (74); J'Anson (91); Dovaston (217).
Its functions. Windsor (1); Perez (2*c*); C. v. Roby (74).
Is the charter of the courts authority. R. v. Wheatley (19); McLaughlin (31); Bradbury (35); Munday (79); Gentry.
Admissions upon conclusive, irrefragable.
Evidence against inadmissible. Bradbury (35); Pym (46), *et seq.*
Limits judgments and decrees. Munday (79), *et seq.* *See* DICTUM, USURPATION.
Municipal and county boards must have and be bound by. Provident (89).
Municipal corporations estoppels of record upon. Provident (89).
Federal procedure and protection depends upon. Furman (147*a*).
Necessary for the protection of officers. Savacool (164); Howard (166).
Contract; Allegations of elements protect from arbitrary obligations, usurpation and spoliation of property. Lampleigh (301), *et seq.*
Is a constitutional implication. C. v. Roby (74).
MARBURY (142): *Expressio unius.*
MARRIAGE: Contracts. Holman (263).
Contracts in restraint of. Scott (417).
MARRIED WOMEN: Contracts of. Mauby.
MARRIOT (or MARRIOTT): *Interest reipublicæ.*
MARSHALSEA CASE: *See* Piper (114).
MARTIN v. EVANS: *See* COHENS; DICTUM.
MARTIN v. HUNTER'S (246): Polity of Federal government.
MARTIN v. PORTER (417): Measure of damages.
MARX (126): Taxation; essentials.
MARZETTI (417): Exemplary damages.

MASTER (417): Commercial papers.
MASTER AND SERVANT: Liability for injury of servant. Hilliard (417); Roberts (417).
MATTHEWS (193): *Corpus delicti* how proved.
MAXIMS: Are the prescriptive constitution. Windsor (1); Clem (2*c*). *See* PREFACE.
Fundamental; of government are its greatest asset; p. 11. *See* PREFACE (DATUM POSTS); Murray (219); Taylor.
Are the beason lights of the law. *See* PREFACE (DATUM POSTS).
Juridical, of a constitutionalism are *Verba fortius, Frustra probatur* and *De non apparentibus*. P. 11.
Of morality. *See* JURIS PRAECEPTA; FALSUS; ALLEGANS; MORALITY; BONA FIDE; VERBA FORTIUS. Keech (417).
Paul was proud of them. *See* PREFACE.
Ulpian, Bacon and Hamilton advocated their use. *See* PREFACE.
MAY v. BURDETT: Animals; Liability for keeping.
McAFEE v. REYNOLDS: Courts are bound by their records. McLaughlin (31).
McALLISTER (3): Substantial error can not be waived.
McARTHUR (99): An appellant must affirmatively show. *Actore.*
McCAUGHEY (184): Evidence need not be be pleaded.
McCULLOCH (or M'CULLOCH) (147): A principal thing carries its incidents.
McCULLY v. CLARK (206): Negligence must be proved.
McELMOYLE v. COHEN (56): Full faith and credit due judicial records.
McKYRING v. BULL (33): New matter must be pleaded.
McLAUGHLIN (31): Function of judicial records.
McMANUS v. CRICKETT (or M'MANUS): *See* AGENCY.
McNAGHTEN'S CASE (or M'NAGHTEN'S) (195): *Actus non facit;* intent in crime.
MELIOR EST CONDITIO DEFENDENTIS (or *Possidentis*): The cause of the defendant is the better.
MELIUS PETERE FONTES*: § 45. PREFACE.
MEMORANDUM: What required under statute of frauds. Wain (335).
Signature of what sufficient. Brown (346).
MENS REA: *See* ACTUS NON FACIT.
MERCHANTS' BANK v. STATE BANK (417): Corporations liable for tort.
MEREST v. HERVEY (or HARVEY): Exemplary damages.
MERGER: Causes of action when they merge. White (175).
Private wrong into public. White.
MERRYWEATHER v. NIXON: No Contribution among wrongdoers.
MICHOUD v. GIROD: *See* KEECH; AGENCY; TRUSTEES.
MILLER v. DILL (290*b*): Objections—exceptions must be specific.
MILLER v. HYDE: Title passes upon judgment of tort, when. Lovejoy (289).
MILLER v. RACE: Commercial paper; Bank bills like cash pass on delivery.
MILLETT v. P. (417): Limitations of legislative power.
MILLS v. DURYEE (57): S. P. McElmoyle; Records of sister states.
MILLS v. WYMAN (316): Consideration for contract.
MISERA EST SERVITUS, UBI JUS EST vagum aut incertum: It is a miserable slavery where the law is vague or uncertain. *See* UBI JUS NULLUM; STABILITY OF LAW; PREFACE (DATUM POSTS).
MISJOINDER: *See* BRUGGER; RICE.
MISNOMER: *See* NAMES; IDEM SONANS.
MISREPRESENTATION: *See* CAVEAT EMPTOR; DECEIT; WARRANTY.
As an element in the law of sale—contract. Chandelor (374); Pasley (375-384), *et seq.;* Jenkins (417).
MISTAKE: *See* IGNORANTIA LEGIS. Gordon (417); Lansdowne (417).
Avoids a contract when. Zaleski (306).
Outline citation; General observations. Brown (347); Kyle (348); Wheadon.
Bilateral error may be corrected. Brown (347); Mitchell v. Kingman (415); Contract of insane.
As to existence of thing sold avoids sale. Tarling (404); Kyle (348).
Negligence does not excuse. Brown (347).
As to person contracted with vitiates. Wheadon (349).
Mutual mistake is ground for correction. Wheadon (349).
Reformation; rescission. Hunt (417).
MITCHEL v. REYNOLDS (372): Restraint of trade; Contracts contrary to public policy.
MOBLEY v. NAVE (46*a*): Records are irrefragable. *See* MONDEL.
MODICA CIRCUMSTANTIA FACTI JUS mutat: A small circumstance attending an act may change the law. § 215.
MODUS ET CONVENTIO VINCUNT LEgem**: *See* CONSENSUS; COMMUNIS. §§ 108, 218, 332, 393, 403.
MOHR v. MANIERRE (68): Sale of lands of decedents; strict rules of procedure.
MOLTON v. CAMROUX (413): Insane; Contracts of.
MONDEL (77): Records are irrefragable. *See* MOBLEY.
MONEY HAD AND RECEIVED: Hendrick (319); Boston (320); Brooks (370).
MONOPOLY: Forestalling, regrating State of Nebraska (417); Mitchel (372).
MONTANA CATHOLIC v. MISSOULI CO. (10*b*): Pleadings, their functions.
MONTGOMERY BEER BOTTLING WORKS v. Gaston (47): What is a record.
MONTGOMERY v. EDWARDS (292): Exceptions must be specific.
MOORE v. C. (21): Every presumption is against a pleader.
MORALITY: Maxims of. *See* SUMMA; ALLEGANS; NULLUS; COMMODUM; EX DOLO; FRUSTRA PROBATUR; IN PARI; MALUM; FALSUS; CAVEAT; SIMPLEX; VERBA FORTIUS; GOOD FAITH; BONA FIDE; HE WHO SEEKS EQUITY, etc.; JURIS PRAECEPTA; NIHIL POSSUMUS; JURARE EST DEUM. Cutter (308); Weltmer (268*a*); Beaumont (367); Pain (107); Windsor (1); Trist v. Child (214); Holman (263-273), *et seq.* VARIANCE; DEPARTURE; PRESCRIPTIVE CONSTITUTION.
Equivocal pleadings, objections and exceptions, obnoxious. *See* CERTAINTY. L. C. 290*b*-299: cases.
Moral laws are annexed by implication. Trist (214), *et seq.*
Auction sales; puffing bids invalid. Payne.
Entire contracts; Breach of; recovery; Moral considerations. Cutter (308).
Agent cannot plead illegality when sued for funds derived from a trust relation. Brooks (370).
MORAL OBLIGATIONS: *See* CONSIDERATION.
MORLEY (377): Warranty; Title to property is implied.
MOSER (125): Taxation depends on a record.

MOSS (417): Registration of mortgages to give notice.
MOSTYN v. FABRIGAS (274): Venue; local and transitory causes of action.
MOTION: In arrest must appear from the mandatory record. Harris (158). *See* Hitchcock (12).
In arrest is founded on a ground of the general demurrer. Windsor (1), *et seq.*; Lampleigh (301), *et seq.*
Functions of, in practice. P. v. McCumber (110).
MOTIVE: *See* INTENT.
MURRAY (219): Due process of law.
MUNDAY v. VAIL (79): Pleadings confer jurisdiction.
MULTITUDO IMPERITORUM PERDIT CUriam: A multitude of ignorant practitioners destroys a court. § 74.
MUNICIPAL CORPORATIONS: *See* CORPORATIONS.
MUTUALITY: Both sides must be bound by a contract or neither is. Cook (320); Payne (307); Hendrick (319).
MYERS (150): Abatement pleas.
NAMES: One may adopt any name. Moore v. C. (21); Brown (346). *See* PRÆSENTIA CORPORIS.
In procedure must be certain. Wiebold (98). *See* CERTAINTY; CONSTRUCTIVE NOTICE.
Corporate existence must be alleged. Wiebold (98); Harris (229).
Outline citation. General observations. Brown (346).
NEAGLE'S CASE (248): A principal thing carries with it its incidents. *Expressio eorum.* Logan (249); M'Culloch (177).
NECESSARIES: Contracts for. Boston (320). Peters (417); Ryder (417). *See* INFANTS; MARRIED WOMEN. § 164.
NECESSITAS INDUCIT PRIVILEGIUM quoad jura privata*: Founds many rules of procedure. C. v. Kane (183). § 183, 194, 273.
NECESSITY: Influences many rules of evidence. C. v. Kane (183).
Procedure influenced by; illustrations. C. v. Kane. *See* SALUS.
Declarations against interest rest upon. Higham (213c), *et seq.*
NEEDHAM (261): Judgments will be set aside for fraud.
NE EXEAT REGNO (REPUBLICA): That he leave not the realm.
NEGATIVE ALLEGATIONS: How pleaded and proved. Green (90).
NEGATIVE PREGNANT PLEADINGS: Pain (107). *See* AMBIGUITY.
NEGLIGENCE: Allegations of must be proved as laid. Bristow (135); King. How proved. *See* BURDEN OF PROOF. King (205); McCully (206); Stokes (207). *Res ipsa loquitur.* Kearney (211).
NEGOTIABLE INSTRUMENT: *See* COMMERCIAL PAPER.
NELSON (129): Inferior tribunals.
NEMO ALLEGANS SUAM TURPITUDINEM audiendus est: No one alleging his own turpitude is to be heard as a witness. § 415.
NEMO DAT QUI NON HABET*: *See* SALES.
NEMO DEBET BIS VEXARI PRO UNA ET eadem causa**: *See* RES ADJUDICATA. §§ 69, 72, 74, 75.
NEMO DEBET ESSE JUDEX IN PROPRIA sua causa**: Dimes v. Grand Junction Canal. P. 3, 7, §§ 176, 214, 222, 269.
NEMO PRÆSUMITUR MALUS*: *See* Coffin.
NEMO TENETUR SEIPSUM ACCUSARE**: P. 3, §§ 169, 191, 193, 201.
NEW MATTER: Matter of must be pleaded. McKyring (33).
Enumerated matters. McKyring.
NEWSPAPER: What is for publication of notices. Ricketson (59).
NEW TRIAL: Essential to present waivable matter for a review. Richardson (230). *See* ASSIGNMENT OF ERROR; DEBILE. L. C. 296-299.
NEW YORK CENTRAL (355): Common carrier can not contract for immunity of liability.
NICHOLS: *See* ACTUS DEI.
NIGRUM NUNQUAM EXCEDERE DEBET rubrum: Text should be no more comprehensive than the title. Bobel (250). § 250.
NIHIL IN LEGE INTOLERABILIUS EST, eandem rem diverso jure censeri: Nothing in law is more intolerable than that the same case should be subject (in different courts) to different views of the law. § 219*a*. *See* UBI JUS INCERTUM.
NIHIL POSSUMUS*: Graver (103).
NIHIL TAM CONVENIENS EST NATURALI æquitati quam unumquodque dissolvi eo ligamine quo ligatum est*: §§ 183, 279, 311, 323.
NIL FACIT ERROR NOMINIS CUM DE corpore constat: An error in the name is immaterial, if the body is certain. § 220. *See* PRÆSENTIA CORPORIS.
NIXON (127): Record must evince fundamental requirements. *Audi.*
NOBLE (251): Custom can not derogate from general laws; Statutes.
NON HÆC IN FŒDERA VENI*: Assent essential for contract. §§ 1, 301, 302, 303, 308, 320, 324, 327, 334, 334*a*, 335, 345, 405.
NON OBSTANTE VEREDICTO: *See* ARREST OF JUDGMENT; COLLATERAL ATTACK. Windsor (1), *et seq.*; HITCHCOCK (12), *et seq.*; J'Anson (91). §§ 85, 88.
NON POTEST ADDUCI**:
NORRINGTON: *See* ENTIRE CONTRACTS; INSTALLMENT.
NORTHERN BANK v. PORTER TOWNship. Dictum.
NOSCITUR A SOCIIS*: Burks (217*a*). P. 10, § 217*a*.
NOTICE: *See* AUDI; SERVICE OF PROCESS. Judgments depend on. Pennoyer (58).
To the agent is notice to the principal. Le Neve (396).
NOVA CONSTITUTIO FUTURIS FORMAM imponere debet non præteritis*: §§ 123, 237, 238.
NOVATION: Outline citation. Birkmyr.
NUDUM PACTUM: *See* EX NUDO PACTO.
NULLA PACTIONE EFFECI POTEST NE dolus præstetur: By no agreement can it be effected that there shall be no accountability for fraud. *See* PACTA CONVENTA. §§ 218, 352, 354.
NULLI VENDEMUS, NULLI NEGABIMUS, aut differemus rectum, aut justitiam: To none will we sell, to none will we deny or delay right or justice. *See* DELAY; § 300.
NULLUM TEMPUS OCCURRIT REGI*: Lapse of time does not bar the right of the crown. Barron (241). § 241.
NULLUS COMMODUM CAPERE POTEST, etc.*: One can not take advantage of his own wrong. P. 1, §§ 67, 99, 155, 198, 213*e*, 218, 308*a*, 308*d*, 313, 318, 320, 326, 327.
OAKLEY, 3 N. Y. (222): *Nemo debet esse judex.* Dimes (176).

OAKLEY, 4 N. Y. (66): Notice is implied. *See* AUDI.
OBEDIENTIA EST LEGIS ESSENTIA: Obedience is the essence of the law.
OBJECTIONS: In appellate procedure; importance of. *See* EXCEPTIONS. Miller (290*b*). *See* NEW TRIAL; ASSIGNMENT OF ERRORS.
Not always necessary. Windsor (1); Shutte (291).
Must be apt and specific. Grand Trunk R. R. (290*c*), *et seq.* *See* APPELLATE PROCEDURE.
OBLIGATION: Of contracts; impairment of courts may. Hanford (86); Bronson.
Observations relating to. Bronson: cases.
O'CONNELL (224): Constitution of statutes regulating procedure.
OFFER AND ACCEPTANCE: *See* ACCEPTANCE.
Offer must be *bona fide*. *See* AUCTIONS (puffing bids).
OFFICER: Immunity for official acts. Long (159); Stetson (163); Savacool (164). Six carpenters case (165).
OLIVE (182): Judicial Notice.
OMNE MAJUS CONTINET IN SE MINUS**: §§ 22*c*, 26, 74, 75, 91, 232, 232*a*, 299, 313, 324.
OMNIA PRÆSUMUNTUR CONTRA SPOliatorem**: Armory (180). P. 1, § 180.
OMNIA PRÆSUMUNTUR RITE ET SOLEMniter esse acta**: *See* EVERY.
Presumption of regularity never supplies a material jurisdictional matter. Clark (2*b*); Hannah (128); Crepps (113); Pennoyer (58); Ricketson (59). P. 3, 5, 10, §§ 2*c*, 11, 64, 79, 113, 114, 118, 119, 123, 127, 128, 183, 219, 230, 264.
OMNIS RATIHABITIO RETROTRAHITUR et mandato æquiparatur*: *See* RATIFICATION.
ONE IS LIABLE FOR THE NATURAL direct and probable consequences of his act*: *See* EVERY.
OPINIONS; JUDGMENTS; DISTINCTIONS: *See* DICTUM.
OPTIMA EST LEX, QUÆ MINIMUM RElinquit arbitrio judicia: That is the best system of law which confides as little as possible to the discretion of the judge. § 298.
OPTIMUS INTERPRES RERUM USUS*: § 399, 402.
OPTIMUS JUDEX, QUI, MINIMUM SIBI: He is the best judge who relies as little as possible on his own discretion. § 298.
OPTIONS: Contracts; validity of. Good.
ORAL EVIDENCE: *See* EXPRESSIO UNIUS; Iverslie (46-58); Pym (52), *et seq.*
"What ought to be of record must be proved by record and by the right record." *See* MANDATORY RECORD; STATUTORY RECORD; PREFACE; EXPRESSIO UNIUS.
Record defined. Montgomery (47).
What must be in writing. Sturdivant.
Record matter where required is exclusive. Campbell (2*a*); Planing (2*d*); Mobley (46*a*); Pennowfeski. *See* PREFACE; (DATUM POSTS).
It is not only legal, but a duty to contract that a compact shall be proved by a writing, and this contract must be respected. *See* PRESCRIPTIVE CONSTITUTION.
Writing can not be varied consistently with reason, necessity and convenience. Iverslie (46)), *et seq.*; Pym (52); Dutton (381); Sturdivant (410).
Parties make their own contracts. Vogt.
Construction notice depends on record matter that is exclusive. Iverslie (46).
Inadmissible to affect a deed. Worrall (390); Sturdivant (410); Elwell (417).
Oral admission will dispense with a deed. Queen's case (53*a*).
But not of a record or of an essential pleading. Campbell (2*a*).
Commercial paper must speak for itself. Brown (54); Sturdivant (410), *et seq.*
"Is a courier without luggage." Sturdivant (410), *et seq.*
Writing required by the statute of frauds must be sufficient. Goss (55); Wain.
Full faith and credit given judicial records. M'Elmoyle (56), *et seq.*; Mills (57).
Custom cannot be shown by. Noble (257); Wigglesworth (399); Blackett (400); Smith (401); Soutier (402); Cooper.
ORDER OF PROOF OF PRESENTING EVIdence: C. v. Kane (183). *See* DISCRETION.
ORIGO REI INSPICI DEBET*: *See* MELIUS; REGULA.
OSCANYAN (41): Solemn judicial admissions bind client.
OUTRAM (25): Fundamental principles of *res adjudicata*.
OWEN v. WESTON: Amendments of record. *See* WALDEN (139).
OYER AND PROFERT: C. v. Kane (183).
PACTA CONVENTA, QUÆ NEQUE CONtra leges, neque dolo malo inita sunt; omni modo observanda sunt: Contracts which are not illegal, and do not originate in fraud, must in all respects be observed. *See* NULLA PACTIONE; PACTIS; PRESCRIPTIVE CONSTITUTION. §§ 218, 352, 363.
PACTIS PRIVATORUM JURI PUBLICO non derogatur: Private contracts do not derogate from public law. Holman (363), *et seq.* *See* PACTA; NULLA PACTIONE. §§ 321, 352, 354, 371.
PAIN, EX PARTE (107): Repugnant pleadings void.
PARENT AND CHILD: Child cannot recover for tort of parent. Roller (417).
PAROL (ORAL) EVIDENCE: *See* ORAL. Sturdivant (410).
PARTIES: Essential for jurisdiction. Williams (93); Gibler (96); Virginia (285*a*).
General rules; observations. Williams.
Jurisdiction of must be acquired. Pennoyer (58). *See* AUDI.
Joinder, misjoinder, non-joinder rules. Rice (95).
Only a wronged party can complain. Williams (94); S. v. Baughman (268); Weltmer (268*a*).
One cannot prosecute himself. Watkins (269).
Actual controversies only decided. California (270).
Prosecution cannot appeal in criminal cases. S. v. Croteau (271).
PARTNERS: Are agents for each other. Livingston (345).
Outline citations; general observations. Livingston.
Contracts among, participation in profits. Waugh (417).
PART PERFORMANCE: What constitutes. *See* EQUITABLE EXCEPTIONS TO STATUTE OF FRAUDS. Lester (341).
PASLEY v. FREEMAN (375): Deceit.
PASSENGERS: Rights and duties of, in relation to common carriers. Coggs (350); Wilson (351); Railway Co. v. Lockwood (352); Ingalls (353); Hollister (354); N. Y. R. R. (355); Calye's

Case (356); Kansas City R. R. v. Riley (357).
Tickets, contracts; construction. Cherry (417); Le Blanche (417).
Cannot discharge carrier from all liability. N. Y. Cent. R. R. (352).
PATRICK v. BOWMAN: Deceit; contract by letter (417).
PAYMENT: What constitutes. Cumber (311).
Application of. Field (387).
Rules of. Tobey (417).
Part payment of overdue liquidated debt is no discharge or accord. Cumber.
PAYNE (307): Auction sales.
PEACHY v. SOMERSET (392): Liquidated damages; penalties.
PEARCE (368): *In pari.*
PECCATUM PECCATO ADDIT QUI CULpæ quam facit patrocinium defensionis adjungit: He adds one offense to another who, when he commits a crime, joins to it the protection of a defence. § 103.
PENALTY: Stipulation for fixed damages, when construed a. Kemble (391); Sloman (393).
PENN (275): Equitable jurisdiction over non-residents.
PENNOYER (58): *Audi alteram partem.*
[C.—stands for Commonwealth; P.—for People; R. R.—for Railroad; R.—for Rex (King) or Regina (Queen); S.—for State; U. S. for United States.]
P. EX REL ATTORNEY GENERAL v. Brown (131): Inferior tribunals.
PEOPLE'S BANK v. CALHOUN (12*d*): Stipulations; contract; consent cannot delegate from the mandatory requirements of a constitutionalism.
P. v. HASTINGS (144): Only an assessor can assess; division of state power.
P. v. MAYNARD (143): *See* P. v. Hastings.
P. v. McCUMBER (110): Sham; false pleadings.
P. v. ROBEY: Intent no element in statutory crime. M'Naghten (185).
P. v. ROGERS (198): Malice; intent, how proved.
P. v. SEYMOUR (256): Curative statutes of taxation.
P. v. TURNER (252): Limitations of legislative authority.
PEREZ v. FERNANDEZ (2*e*): Error on the mandatory record saves itself.
PERJURY: Ground for setting aside judgment. Barr (265).
PERRY v. PORTER (136*a*): *Allegata et probata* must correspond.
PERSONAL INJURIES: *See* SQUIB CASE.
PETERS v. FLEMING (417): Infants' contracts for necessaries.
PETER v. COMPTON (340): Contracts not to be performed within one year.
PHELPS (191): Possession of certain things as evidence of crime.
PIPER (114): Inferior and superior tribunals.
PLACITA (PLACITUM): Importance of in appellate procedure. Planing (2*d*); Stubbings (49).
Essential for record. Planing (2*d*); Stubbings.
Technicalities the safeguards of the law. Stubbings.
PLANING MILL CO (2*d*): The right record must evince required matter.
PLEADINGS: Functions of. Windsor (1); Campbell (2), *et seq.*; Munday (79); James (233).
Are the foundation of the judgment. Campbell (2); Clem (2*c*).
Defined. Fish (2*c*). *See Contra:* cases.
People's Bank (12*d*); Munday (79); Piper (114).
Are always construed strictly. Lea (30); Dovaston (217). *See* VERBA FORTIUS.
Are servitors of justice if not abused. Robinson (45).
Are construed from the conserving principles. Robinson (45). *See* CONSERVING PRINCIPLES.
Are made instruments of chicane and covin. Robinson.
Admission is conclusive. Bradbury (35).
As evidence. Boileau (43); C. v. Kane.
Mandatory record matter conclusive. Boileau (43). *See* ALLEGANS.
Sworn answer, effect. Boileau.
Code rules strict and expressly declares effect. Boileau's cases.
Jurisdiction depends on. Windsor (1); Campbell (2), *et seq.*; R. v. Wheatley (19); Moore (21), *et seq.*; Mallinckrodt (12*a*); Garland (60), *et seq.*; Galpin (63), *et seq.*; Williamson (65); C. v. Roby (74); Guedel (74*a*), *et seq.*; Mondel (77); Munday (79), *et seq.*; Horan (85), *et seq.*; J'Anson (91), *et seq.*
Certainty of all pleadings requisite to support the conserving principles whether civil or criminal. Campbell (2); Moore (21), *et seq.*; R. v. Waters (71); Cruikshank (232); Lea.
Aider by verdict; limitations. Hitchcock (12); R. v. Waters (71); Dobson.
Are irrefragable. Mondel (77); Munday (79); Gay (138). *See* RES ADJUDICATA.
Are to limit issues and to narrow proofs. Munday (79); Gay (138); Lea (30).
General resume of. Williamson (65); Harvey (123).
Duplicity forbidden. *See* DUPLICITY. Lea (30).
Must not be double. Bowlus (100); Rison (253); Lea (30).
Must be true. Wonderly (102); Graver (103); Cutter (308); Payne (307).
Repugnancy forbidden. Pain (107); Lea.
Sham forbidden. P. v. McCumber (110).
Do not confer jurisdiction. Wonderly; Graver.
Prolixity forbidden. Whitney (112); Haskel (101); Sturges (111).
Codes forbid repetition. Whitney (112); Sturges (111).
Jurisdiction depends on real facts. Wonderly; Graver, *et seq.* *See* FABULA. S. v. Conkling (109); Weltmer (268*a*).
As evidence. C. v. Kane (183); Boileau.
Lost, how proved. C. v. Kane; Campbell (2*a*).
Allegations not denied are admitted. C. v. Kane; Boileau (43).
As admissions. C. v. Kane (183).
Statutory rights, how pleaded. Williams.
Indictments under statutes. C. v. Bean.
Provisos, how pleaded. C. v. Hart (227).
Contract; technical allegations for; protection depends on. Lampleigh (301), *et seq.*; Cumber (311); Rann (312).
Res adjudicata depends on. L. C. 25-30; C. v. Roby (74); Bates (225).
Prescriptive constitution requires for protection. *See* PRESCRIPTIVE CONSTITUTION; RES ADJUDICATA.
PLEAS: *See* ANSWERS; REPLICATION.
Of confession and avoidance; requirements; construction. J'Anson (91).
Cannot be double. Bowlus (100). *See* ALLEGANS.
Must not be too broad. Bowlus; Rison.
If bad in part are bad in toto. Rison.

POLHILL (411): Agency; assumption of authority.
POLICE POWER: Limitations. Barbier. On right to contract. Millett (417).
POOR (37): Denials must be certain.
POSITO UNO OPPOSITORUM NEGATUR alterum: One of two opposite positions being affirmed, the other is denied. § 34.
POSSESSION: Of commercial paper is *prima facie* evidence of ownership. Bonnell (185).
Of land; effect of as evidence. *See* RES IPSA LOQUITUR. Lester (341); Bell (417).
PRACTICAL CONSTRUCTION: *See* CONSTRUCTION.
Illustration. Kelly (285); Maher (255); Lester (341).
PRACTICE: *See* PROCEDURE.
PRÆSENTIA CORPORIS TOLLIT ERrorem*: §§ 220, 266, 268*a*. *See* NIL FACIT ERROR; RES IPSA LOQUITUR. Weltmer (268*a*). VIEW OF PREMISES.
"A rose by any other name would smell as sweet," A thorn by any other name would prick as deep.
PRÆSUMATUR PRO JUSTITIA SENTENtiæ*: The justice of a sentence should be presumed. Clem (2*c*). § 2*c*.
PRAYER: Functions of. White (140).
General, sufficient. White.
May be waived. White.
Any sufficient. Hood (141).
PREPONDERANCE OF EVIDENCE: *See* REASONABLE DOUBT.
Sufficient in a civil case. Bonnell (185).
Crime must be proved beyond a reasonable doubt. Bonnell. *See* PRESCRIPTIVE CONSTITUTION.
PRESCRIPTIVE CONSTITUTION: *See* PREFACE (DATUM POSTS). Windsor (1) and following cases; J'Anson (91); Trist (214): cases. PUBLIC POLICY; NECESSITY; MORALITY; CONVENIENCE; MANDATORY RECORD; REASON; also the maxims: *Non hæc in fœdera veni; Frustra; De non apparentibus; Verba fortius; Verba intentione; Favorabiliores; Pacta conventa.* Jordan (324): cases: P. v. Turner (252); Trist (214); Dovaston (217); J'Anson (91); Murray (219); Oakley (222); Bates (225).
Protects the mandatory requirements of a constitutionalism. Windsor (1); Clem (2*c*). *See* IMPLICATIONS; RES ADJUDICATA; CONSERVING PRINCIPLES; MANDATORY RECORD; CERTAINTY. C. v. Roby (74).
Right to cross-examine is a fundamental right in a government of protection with accusatory procedure. Wright.
The gift of the Roman and the Norman races. *See* PREFACE. Windsor (1); Clem (2*c*); Dovaston (217).
Verba fortius is a first principle of. *See* PREFACE. Moore (21), *et seq.*; Springer (24).
Fundamental requirements are annexed by implication. Windsor (1); Oakley (66, 222); Weaver (67); Bristow (135); Trist (214), *et seq.*; Oakley (222); Lampleigh (301); S. v. Bolden (216).
Variances cannot be authorized by statute. Bristow (135), *et seq.* *See* p. 11. FRUSTRA. Huntsman (231).
Departures cannot be allowed by statute or codes. Bristow (135), *et seq.*; Huntsman (231).
Common law expands and contracts words in constitutions. C. v. Hess (215); S. v. Bolden (216).
The fundamental maxims of government constitute. Taylor (219*a*); P. v. Turner (252); Marbury (142); Ashby (273).
Contract; limitations of legislative authority to interfere with. Taylor (219*a*); Lampleigh (301). *See* ORAL EVIDENCE.
A statute cannot authorize administration proceedings upon a living man's estate. Taylor (219*a*); Springer (24).
Cannot create causes of action where none previously existed. *See* FABULA. Taylor (219*a*); Springer (24); S. v. Baughman (268); Weltmer (268*a*).
Statutes cannot nullify higher laws. Marbury (142); P. v. Turner (262); Lester (341). *See* FRAUD.
Due process of law; its definition involves elements of. Murray (219); Logan (249); Springer (24).
Common law rights are equal to those specified in written constitution. Dash (237*a*); Bronson (238).
Rex non potest peccare applies in construing the federal constitution. Barron (241).
The word jury has a common law meaning. Work (242).
Constitutions are construed in the light of old law. Work (242); S. v. Bolden (216).
Limitations of legislative power. P. v. Turner (252); S. v. Baughman (268); Taylor (219*a*); S. v. Beach (258); S. v. Bolden (216).
Unwritten constitution denied. Rison (253); Blair (254). *See* TRIST.
Statutory prescriptions as to effect of evidence and its sufficiency. S. v. Thomas (257); S. v. Beach (258); Phelps.
Delays of justice; observations. Waco.
The essential maxims of contract involve. Lampleigh (301); Taylor (219*a*); Cutter (308). *See* SALES.
Parties may contract as they please if only legally. *See* CONTRACT.
And that a writing shall evince the contract they have made. *Fiunt enim. See* ORAL EVIDENCE; PACTA CONVENTA.
Higher laws only limit legislatures. Rison (253); Blair (254).
Contracts cannot be enforced upon persons against consent. Bartholomew (302); Cutter (308). *See* SALES.
Declaring contracts and obligations in violation of the vital maxims of contract would result in confiscation of property. Lampleigh (301). *See* CONTRACT; SALES.
Protection from presumption of guilt or of liability is an essential principle of. *See* ACTORE; BURDEN OF PROOF.
Innocence is presumed. Coffin v. U. S. Bonnell (185).
Governments accusatory require allegations and proofs. *See* ACTORE; BURDEN OF PROOF; INNOCENCE; FRUSTRA.
Governments inquisitorial and confiscatory proceed without allegations and proofs. *See* DUE PROCESS OF LAW.
Defendants are favored. *Favorabiliores. See* DEFENDANTS; INNOCENCE; ACTORE.
All laws are construed by the principles of the immutable constitution. Trist (214); Oakley (222); Indianapolis (223); O'Connell (224); Bates (225); Huntsman (231); S. v. Bolden (216); S. v. Townley (225*a*).
Constitutions yield to. Oakley (222).
Statutes likewise. Bates (225); Lester (341); S. v. Croteau (271).
Protection from fraud and arbitrariness depend upon principles of. Oakley

(222); Lester (341); Windsor (1). *See* RES ADJUDICATA; P. v. Turner (252); S. v. Baughman (268); S. v. Beach (258).
Fraud and gross negligence; immunity from, cannot be stipulated for. N. Y. R. R. (352). *See* PACTA.
The mandatory requirements of a constitutionalism cannot be consented nor contracted away. Windsor (1).
Stability of law is a requirement of. *See* STARE DECISIS; STABILITY OF LAW; PREFACE (DATUM P.).
Reason is a principle of. S. v. Bolden.
Inalienable rights are protected by. P. v. Turner (252).
PRESENCE: Of prisoner essential at each step in trial for felony. Munday (79): cases.
Mandatory record must show it. Munday (79): cases.
PRESUMPTION OF REGULARITY: *See* OMNIA PRAESUMUNTUR RITE; EVERY; SYSTEM. C. v. Kane (183); Bonnell (185). INNOCENCE; PRESCRIPTIVE CONSTITUTION; POSSESSION; RES IPSA LOQUITUR; OMNIA PRAESUMUNTUR CONTRA SPOLIATOREM; RES INTER ALIOS; PROBATIS EXTREMIS; PRAESENTIA CORPORIS; VLEW OF PREMISES; VERBA FORTIUS.
Recent possession of fruits of crime. R. v. Partridge (190).
Cannot be made conclusive. S. v. Beach (258). *See* PRESCRIPTIVE CONSTITUTION.
PRESUMPTIONS: *See* EVIDENCE; L. C. 183-212; EVERY; OMNIA PRAESUMUNTUR RITE; OMNIA PRAESUMUNTUR CONTRA SPOLIATOREM. C. v. Kane (183); Bonnell (185).
Regularity. *See* OMNIA PRAESUMUNTUR RITE. Crepps (113); L. C. 113-134.
Must be respected. Bonnell (185). *See* PRESCRIPTIVE CONSTITUTION.
PRICE (213*f*): Shop books, admissibility in evidence.
PRIORITY: *See* QUI PRIOR TEMPORE.
PRISONER: Must be present at each step in trial for felony. Munday (79): cases.
PRIVITY: In tort. *See* SQUIB CASE; IN JURE NON REMOTA.
In contract. *See* CONSIDERATION. Hendrick (319).
PROBATIS EXTREMIS PRÆSUMUNTUR (præsumitur) media*: *See* EVERY; RES IPSA LOQUITUR.
§§ 2c, 122, 182, 211, 312, 341.
PROCEDURE: *See* APPELLATE PROCEDURE.
The study of procedure is the study of government. *See* PREFACE. Windsor (1); J'Anson (91); Cruikshank (232). *See* MANDATORY RECORD; GOVERNMENT; UBI JUS; CONSERVING PRINCIPLES; JURISDICTION; DIVISION OF STATE POWER, CONSTITUTIONAL LAW.
To secure a review. *See* APPELLATE PROCEDURE; WAIVER; EXCEPTIONS; OBJECTIONS; NEW TRIAL; ASSIGNMENTS OF ERROR; CONSENSUS.
What can and cannot be waived. Windsor (1); Campbell (2); Hitchcock (12); R. v. Wheatley (19); Outram (25); Munday (79); J'Anson (91); Huntsman (231); Cruikshank (232); Dobson (232*a*); L. C. 290-299. *See* MANDATORY RECORD.
The conserving principles of, are DATUM POSTS. *See* PREFACE; DUE PROCESS OF LAW.
Important cases cited. Barron (241).
Embraces evidence, pleading and practice. Windsor (1). *See* DE NON APPARENTIBUS; DISTINCTIVE TITLES RELATING TO.
Appellate procedure a conserving principle; fundamental rules. Windsor (1), *et seq.*; L. C. 290-299.
"What ought to be of record must be proved by record and by the right record. Windsor (1). *See* MANDATORY RECORD; STATUTORY RECORD; BEST EVIDENCE; ESTOPPEL.
The mandatory record is a constitutional implication. Windsor (1), *et seq.*; Huntsman (231); Cruikshank (232). *See* CONSERVING PRINCIPLES; AUDI; VERBA FORTIUS.
A rule of construction and a presumption upon which depend a government accusatory. *See* ACTORE; DE NON APPARENTIBUS; FRUSTRA.
Contract stability of, essentials of, depend upon. Lampleigh (301).
Ex nudo pacto non oritur actio involves procedure. Lampleigh.
Non hæc in fœdera veni also. Lampleigh.
The request in contract when implied or presumed. Lampleigh.
Interacts upon contracts. Beaumont.
PROCESS: Must be served unless party appeared. Pennoyer (58).
Regular; essential to protect officer. Savacool (164).
What is regular. Savacool.
Officer must return; liability. Six C. C.
PRODUCTION OF DOCUMENTS: Rules. C. v. Kane (183).
Original writing required telegrams. R. v. Gibson (272).
PROHIBITION: By Federal to state court. Neagle's (248).
PROLIXITY: When to be avoided. J'Anson (91); Rosen (92); Whitney (112); Farnam (97); Sturges (111).
Statutory record should avoid. Vaiden.
Must be avoided. C. v. Kane (183).
Of proof unnecessary. C. v. Kane.
Abbreviations and figures may be used. Berrian v. S.
PROTECTION DUE FROM GOVERNMENT: Marbury (142); Lange (159); Waco (300). *See* USURPATION; TECHNICALITIES; PRESCRIPTIVE CONSTITUTION.
PROVIDENT LIFE AND TRUST CO. (89): Municipal bonds depend upon a record.
PROVINCE OF COURT AND JURY: *See* AD QUAESTIONEM. S. v. Crôteau (271).
General rules. Bonnell (185). *See* AD QUAESTIONEM.
PROVISOS: In statutes, how pleaded. C. v. Hart (227).
PROVOCATION: *See* VOLENTI.
PROXIMATE CAUSE: Illegality; as a defense must be. Brooks (370). *See* REMOTENESS; SQUIB CASE; IN JURE; PRIVITY.
PUBLICATION: Of process; when sufficient. Ricketson (59): cases.
PUBLICATION OF SUMMONS: Ricketson (59); Galpin (63).
PUBLIC POLICY: *See* SALUS; ILLEGALITY; IN PARI; RESTRAINT OF TRADE.
Influences procedure. Windsor (1).
Contracts in violation of, void. Holman (363-373), *et seq.*
Influence upon common carrier's contract. Railway Co. v. Lockwood (352).
Gross negligence cannot be stipulated against. R. R. Co. (352). *See* SALUS; PACTA; NULLUS; NULLA.
PUNISHMENT: *See* UBI JUS.
Is an incident to crime. Logan (249).
PUSEY (276): Delivery of specific chattels in equity.
PYM (52): Oral evidence.

QUANDO ALIQUID PROHIBETUR EX DIrecto, prohibetur et per obliquum: When anything is prohibited directly, it is also prohibited indirectly. Illsley (169). §§ 98, 169.
QUANDO JUS DOMINI REGIS ET SUBDITI CONCURRENT JUS REGIS PRÆFERRI DEBET: When the right of the sovereign and of the subject concur, the right of the sovereign ought to be preferred. *See* SALUS.
§§ 168, 345.
QUANDO VERBA STATUTI SUNT SPECialia, ratio autem generalis, generaliter statutum est intelligendum: When the words of a statute are special, but the reason or object of it general, the statute is to be construed generally. *See* VERBA INTENTIONE.
QUASI CONTRACT: Boston (320); White.
QUASI MUNICIPAL CORPORATIONS: Limitations of power to contract. White (417). *See* COUNTY.
Contracts; status of. Lycoming (417). *See* CORPORATIONS; ULTRA VIRES.
QUEEN'S CASE, THE (53*a*): Oral evidence; its effect.
QUICQUID PLANTATUR SOLO, SOLO CEDit: Whatever is affixed to the soil belongs to it. *See* FIXTURES.
QUICQUID SOLVITUR, SOLVITUR SECUNdum modum solventis*: *See* APPLICATION OF PAYMENTS. § 387.
QUI FACIT PER ALIUM FACIT PER SE: He who acts by or through another acts himself. *See* QUI PER ALIUM; AGENCY. § 370.
QUI HÆRET IN LITERA, HÆRET IN cortice**: *See* BENIGNAE FACIENDAE; BENEDICTA; MALEDICTA.
QUI JUSSU JUDICIS ALIQUOD FECERIT non videtur dolo malo fecisse quia parere necesse est: He who does anything by command of a judge will not be supposed to have acted from an improper motive, because it was necessary to obey. Savacool (164). § 164.
QUILIBET POTEST RENUNCIARE JURI pro se inducto**: *See* MODUS; COMMUNIS.
QUI NON NEGAT, FATETUR: He who does not deny, admits. *See* DENIALS; ADMISSIONS; QUI TACET.
QUI PER ALIUM FACIT PER SEIPSUM FACERE VIDETUR: He who does anything through another is considered as doing it himself. *See* AGENCY; RESPONDEAT SUPERIOR. §§ 202, 350.
QUI PONIT FATETUR: The points he alleges are admitted.
QUI PRIMUM PECCAT ILLE FACIT rixam*: *See* SQUIB CASE. C. v. York (197). §§ 19, 308, 394.
QUI PRIOR EST TEMPORE POTIOR EST jure**: Mortgages, registration of. Keech (417); Moss (417). *See* PRIORITY. Le Neve (396).
§§ 287, 395, 396, 397.
QUI SENTIT COMMODUM, SENTIRE DEbet et onus**: *See* RESPONDEAT SUPERIOR; Cornfoot (385). §§ 202, 343, 345.
QUI TACET CONSENTIRE VIDETUR: Silence gives consent. *See* QUI NON NEGAT; CONSENSUS; DENIALS. § 292.
QUOD AB INITIO NON VALET, IN TRACtu temporis non convalescet**: Shutte (291); p. 8, §§ 19, 61, 62, 79, 85, 119, 130, 135, 261, 301, 367.
QUOD EST INCONVENIENS*: *See* CONVENIENCE.
QUOD LEX NON VETAT PERMITTIT*: James (233). § 249.
QUOD MINUS EST IN OBLIGATIONEM VIdetur deductum; That which is the less is held to be imported into the contract. *See* OMNE MAJUS. § 324.
QUOTIES IN VERBIS NULLA EST AMBIguitas, ibi nulla expositio contra verba fienda est**:
RAILROADS: *See* COMMON CARRIERS. L. C. 350-357.
[C.—stands for Commonwealth; P.—for People; R. R.—for Railroad; R.—for Rex or Regina; S.—for State; U. S.—for United States.]
R. R. v. GREER (283): Equity suffers not a wrong without a remedy. *Ubi jus.*
R. R. v. STEWART (290*a*): Prolixity to be avoided in Appellate Procedure.
RAILWAY COMPANY v. LOCKWOOD (352): Carriers can not contract for immunity.
RANN v. HUGHES (312): *See* CONSIDERATION.
RANSOM v. WILLIAMS (122): The authority for selling land must properly appear of record.
RATIFICATION. *See* OMNIS RATIHABITIO. *Ultra vires* contract. Hitchcock (417); Salt Lake (417).
RAYMOND (39): DENIALS; SUFFICIENCY.
REAL ESTATE. *See* LANDLORD AND TENANT; DEEDS; POSSESSION; EQUITABLE EXCEPTIONS TO THE STATUTE OF FRAUDS; FIXTURES; CONFUSION AND ACCESSION.
Possession of, is notice of the occupant's right. Williamson (417); Le Neve.
REASON: *See* CESSANTE.
Influences rules of procedure. C. v. Kane.
A ground and rudiment in construction. S. v. Bolden (216).
REASONABLE DOUBT: Bonnell (185).
Rules stated. Bonnell. *See* ACTORE; PREPONDERANCE OF EVIDENCE.
REBUTTAL EVIDENCE: Discretion in allowing. Barrow (298).
RECEIPT: Effect of as evidence. Cumber.
RECITAL: In records not conclusive. Ferguson (264).
In deeds conclusive. *See* ESTOPPEL; DEEDS.
RECONVENTION: *See* SETOFF; COUNTERCLAIM.
RECORD: What is a; Montgomery (47).
Where required is exclusive. Iverslie (46), *et seq.* *See* ORAL EVIDENCE.
Is irrefragable as to allegation admission, denial and issue. Campbell (2), *et seq.*; Dickson (34), *et seq.*; Bauerman (48), *et seq.*; Brittain (50); Mondel (77).
Mandatory record controls. Bradbury (35); Garland (60).
In one case when admissible as evidence in another. Wagner (290).
Proof of; rules. C. v. Kane (183).
Of sister states; rules. C. v. Kane.
Judicial notice of. C. v. Kane.
RECOUPMENT: *See* SETOFF.
When barred by former recovery. Mondel (77).
RECOVERY AT LAW ENDS LITIGATION: *See* RES ADJUDICATA. Brittain (50).
REDDENDA SINGULA SINGULIS: Let each be put in its proper place.
REES (334*a*): SURETIES; RIGHTS AND REMEDIES.
REFEREE: His statements bind one referring to him. Fitzsimmons (384).
REFERENCE FROM ONE COUNT TO ANother: R. v. Waters—Waverton. L. C. 70-71.
REFORMATION: Mistake as a ground for reforming a contract. Brown (347); L. C. 347-349.

17

REGULA PRO LEGE, SI DEFICIT LEX*: *See* TITLE PAGE; PREFACE (DATUM POSTS).
REHEARING: *See* APPELLATE PROCEDURE; NEW TRIAL.
Is confined to the same case. Conductor's (294).
RELEASE: Under seal, effect. Ellis (389).
Of one joint debtor releases all. Ellis *See* ACCORD.
RELEVANCY OF EVIDENCE: *See* RES INTER ALIOS; ALLEGATA ET PROBATA.
System to prove intent. Strong (213*a*).
Collateral facts to prove intent. Strong (213*a*); R. v. Ellis (213*b*), *et seq.*
Of record in one case in another. Wagner.
REMEDIAL STATUTES: Are liberally construed. *See* STATUTES; CODES.
REMEDY: Attaches to every right. Ashby (273). *See* UBI JUS; Edwards (286); R. R. v. Greer (283).
REMOTENESS: *See* IN JURE; PRIVITY; PROXIMATE CAUSE; SQUIB CASE; EVERY.
Illegality as a defense to contract when too remote. Brooks (370).
When a defense to contract. Hadley.
Sale of goods; seller's liability to third person. Langridge (417); Thomas (417). *See* HENDRICK (319).
REMOVAL OF CAUSE: *See* FEDERAL PROCEDURE.
Pleadings; allegations essential for. Campbell (2).
Right to must appear from the proper record. Campbell (2); Furman (147*a*).
RENUNCIATION: Of contract gives immediate right to sue. Frost (308*a*); L. C. 308*a*-308*d*.
REOPENING A CASE: *See* DISCRETION.
REPLICATION: *See* REPLY. May be waived in some courts. *See* MUNDAY (79): cases.
REPLY: Cannot aid an antecedent pleading. Windsor (1).
REPUGNANCY IN PLEADING. *See* ALLEGANS; FORBIDDEN. Pain (107).
Repugnant clauses are void in construction. Barnard (108). *See* ABSURDITY; ALLEGANS.
REPUGNANCY IN STATUTES: Barnard.
REPUTATION: General, how proved. C. v. Kane (183); C. v. Gannett (213*g*).
REQUEST: *See* ASSENT; INTENT. Promise must request the moving of the consideration expressly or impliedly in contract. Lampleigh (301); Bartholomew (202), *et seq.*
RES ADJUDICATA: Is a conserving principle of procedure, influencing construction and minor rules. *See* PREFACE. L. C. 25-33; 225.
Requirements for are interpreted into statutes and practice acts. Bates (225). *See* PRESCRIPTIVE CONSTITUTION; PUBLIC POLICY.
Depend on pleadings and the entire mandatory record. Campbell (2); Robinson (16); Van Cleaf. (17); Outram (25), *et seq.*; C. v. Roby (74).
Plea of; the defense is odious and all presumptions are against it. Outram (25), *et seq.*; Lea (30), *et seq.*; Bissell (42).
Defendants relying on, are not favored. Outram; Cromwell (26); Lea; Wright.
Party directing and controlling litigation is bound though not named upon the record. Bauerman (48).
The last estoppel prevails. Trevivan (78).
Judgment must be on merits to constitute. Bissell (42).
Repugnancies insufficient for. Pain (107); Huntsman (231). *See* REPUGNANCY.
Judgment must be final and on the merits. Bonesteel (151).
Interlocutory proceedings; judgment on is not final. Bonesteel (151).
The defense originates from public policy. *Interest reipublicæ ut sit finis litium.* Kingston's Case (76); Perez (2*e*).
RES EST MISERA UBI JUS EST VAGUM et incertum: It is a miserable state of things where the law is vague and uncertain. *See* PREFACE (DATUM POSTS).
RESCISSION OF CONTRACT: Illegal contract; when ground for. Whitworth.
RES GESTÆ: What is, illustration. Logan. §§ 202, 384.
RES INTER ALIOS ACTA ALTERI NOcere non debet**: Hendrick (319); Boston (320); pp. 3, 4, 8, §§ 84, 183, 185, 192, 202, 213*a*, 213*b*, 213*d*, 213*e*, 213*f*, 213*g*, 213*h*, 334, 357.
RES IPSA LOQUITUR*: *See* PRAESENTIA CORPORIS; VIEW OF PREMISES. Kearney (211); R. v. Partridge (190); Phelps (191); U. S. v. King (192); C. v. York (197); Stokes (207); Hammack (208); Byrne (209); Losee (210). P. 2, 3, 4, 6, 9, §§ 32*c*, 180, 182, 183, 185, 190, 192, 207, 209, 211, 212, 213*b*, 213*g*, 255, 312, 341, 356, 390.
RESISTING AN OFFICER: *See* ARREST.
RESISTING FELONY BY TAKING LIFE: *See* SELF-DEFENSE.
RESPONDEAT SUPERIOR: Let the principal respond. *See* QUI SENTIT, etc.; Cornfoot (385).
RESTRAINT OF TRADE: Contracts in. Mitchel (372); Mallan (373).
RETREATING TO THE WALL: *See* SELF-DEFENSE.
RETROACTIVE: *See* EX POST FACTO LAWS. Laws; general discussion. Resume. L. C. 239-241.
RETROSPECTIVE DECISIONS. *See* STARE DECISIS; EX POST FACTO LAWS. Hanford (86).
Departure from usual procedure vitiates. Dash (237*a*).
RETURN OF PROCESS: May be impeached. Hauswirth (51).
Liability for failing to make. Six C. C.
REUS EXCIPIENDO FIT ACTOR The defendant by a plea becomes plaintiff. *See* AMBIGUUM.
REVERSAL OF JUDGMENT: For error. *See* APPELLATE PROCEDURE.
Effect on title. Windsor (1).
REVOCATION: Of offer at auction sale. Payne (307).
Of offer. Shuey (323); Cooke (321).
Of illegal contract. Diggle (371).
Of summons by abuse of authority. Windsor (1).
REWARD: Contract obligations from offer of. White (303); Williams (322); Shuey (323).
REX NON POTEST PECCARE*: Governmental corporations cannot commit wrong. Virginia Coupon Cases (285*a*).
Immunity of judicial officers. Lange (159).
Of ministerial officers. Stetson (163); Savacool (164).
§§ 159, 164, 260.
[C.—stands for Commonwealth; P.—for People; R. R.—for Railroad; R.—for Rex or Regina; S.—for State; U. S.—for United States.]
R. v. ELLIS (213*b*): *Res inter alios*; Proof of collateral facts; Relevancy of evidence.

R. v. GIBSON (149): Province of court and jury. S. v. Croteau (271).
R. v. GIBSON (272): Pleas in abatement; important rules.
R. v. GOLDSMITH (20): Aider of pleadings.
R. v. KEYN (171): Jurisdiction of crime.
R. v. LEWIS (173): Jurisdiction of crime.
R. v. O'BRIEN (75): Former jeopardy; rules.
R. v. OXFORD (200): Sanity presumed until contrary is shown; Continuity.
R. v. PARTRIDGE (190): Presumptions; Recent possession of the fruits of crime.
R. v. RILEY (213*h*): Collateral facts; answers to questions of conclusive.
R. v. ROWLANDS (234): Indictments must be certain.
R. v. VANDERCOMB (73): Former jeopardy; a certain record essential for.
R. v. VAUX (72): Indictment and record must be certain.
R. v. WATERS (71): Indictment; limitations of liberal construction.
R. v. WAVERTON (70): Aider by pleading over.
Indictments must be certain and sufficient in substance.
R. v. WHEATLEY (19): Deceit; false pretences; public and private wrongs. Indictments confer jurisdiction; courts are bound by their records.
REYNOLDS (79*a*): S. P. Munday.
RICE (95): Parties; misjoinder; nonjoinder.
RICHARDSON (230): Corporate existence; averment of.
RICKETSON (59): Service by Publication.
RIGHT TO BEGIN: Burden of proof.
RISON (253): Statutes when constitutional.
ROBINSON MINING CO. v. JOHNSON (16): Pleadings must be certain.
ROBINSON v. DAVISON (309): Actus Dei.
ROBINSON v. RALEY (45): Pleadings are servitors of justice.
RODEN v. HELM (12*b*): S. P. Windsor.
ROEHM v. HORST: Breach of contract; right to sue. See Frost (308*a*).
ROSEN v. U. S. (92): Scandal in pleadings.
ROSSITER: *See* VERBA GENERALIA.
ROSS v. HOUSTON: *See* AGENCY; Notice to the agent is notice to the principal.
ROYALL, EX PARTE (284): Habeas Corpus will release from illegal imprisonment when.
ROY N'EST LIE PER ASCUN*: Barron (241); p. 1, § 241.
ROY v. HORSELEY (288): Terms of court.
RULE OF COURT: Must be followed. Citizens (186).
RUNKLE (120): Inferior tribunals.
RUSHTON (5): Fundament views of pleading; outline citation.
RUSSELL v. MANN (87): S. P. Williams.
RUSSELL v. PLACE (27): Pleadings must be certain to support *res adjudicata*.
RUSTIN (134): A tax must be legally evinced.
RYALL (397): Assignments; equitable doctrines; outline citation.
SALE: Outline citation; L. C. 404-409. *See* CONTRACT.
Caveat emptor; See WARRANTY; DECEIT; MISREPRESENTATION; Chandelor (374); Pasley (375); L. C. 374-384. *See* CAVEAT EMPTOR.
Statute of Frauds; requirements of. L. C. 335-341.
Certainty required under statute. Wain.
What must be certain. Tarling (404). *See* CONTRACT; CERTAINTY.
When complete. Tarling (404), *et seq.*; White (303).
Title passes; when. Tarling (404); Gibbs.
Of land; it must be described. Sherman (305); Wain (335).
Memorandum of sale required by statute. Wain (335).
Possession under the statute; how viewed. Lester (341).
Of chattels. Elmore (409).
Acceptance; delivery, under statute. Shindler (407). *See* RES IPSA LOQUITUR.
Offer to buy must be *bona fide*. Payne (307). *See* AUCTION.
Vendee without intention of paying gets no title. Fitzsimmons (384).
Non compos mentis persons, may contract when. Molton (313). *See* INFANTS; MARRIED WOMEN; LUNATICS; NECESSARIES.
Bona fide purchaser, when protected. Lickbarrow (394). *See* BONA FIDE PURCHASER.
Of commercial paper. Swift (417); Miller (417).
Of real estate. Bassett (395); Le Neve.
Of chattels and choses in action. Lickbarrow (394); Bassett (395).
A thief can give no title. *Nemo dat qui non habet. Non dat qui non habet.*
One can not be divested of his rights against his consent is a principle of the unwritten constitution. *See* PRESCRIPTIVE C.
Mistake as to the existence of the land; chattel or thing sold or compromised avoids the contract. *See* MISTAKE.
Offer to buy must be *bona fide*. *See* AUCTION; Payne (307).
Vendee without intention of paying gets no title. Fitzsimmons (384). *See* BONA FIDE PURCHASER.
Bona fide purchasers when protected. Lickbarrow (394); Bassett (395). Le Neve (396).
Title when it passes. Tarling (404); Gibbs (405).
Acceptance; delivery. Shindler (407).
Acceptance under statute of frauds. Tempest (408).
SALUS POPULI SUPREMA LEX*: *See* PUBLIC POLICY; CONSERVING PRINCIPLES. §§ 2*c*, 76, 125, 169, 249, 285, 287, 291, 320, 322, 352, 354, 363, 372, 403.
SANBORN (61): The right pleading must confer jurisdiction.
SANITY: Burden of proof in criminal cases. Hickory (194); M'Naghten (195); Loeffner (196); C. v. York (197); P. v. Rogers (198).
SASPORTAS: *See* DURESS; UNDUE INFLUENCE; COERCION.
SAVACOOL (164): Regular process will protect an officer.
SCANDAL IN PLEADINGS: Forbidden. Rosen (92).
SCANDALOUS MATTER: Rosen (92).
Defamation by counsel. Hastings (160). *See* ARGUMENT.
SCIENTER: Intent; knowledge; motive.
SCIENTIA SCIOLORUM EST MIXTA IGnorantia: The knowledge of smatterers is mixed ignorance. § 220.
SCINTILLA: Of evidence. Bonnell (185).
SCIRE LEGES NON HOC EST VERBA eorum tenere, sed vim et potestatem: To know the laws is not to observe their mere words, but their force and power. §§ 220, 298.
SCIRE PROPRIE EST REM RATIONE ET per causam cognoscere: To know properly is to know a thing by its cause and in its reason. § 220.
SCOTT v. SHEPHERD: Squib Case (417). *See* EVERY; PROXIMATE CAUSE; IN JURE.

SEABURY (281): One must come into court with clean hands.
SEAL: Imports a consideration when. Cumber (311); Rann (312); Boston R. R. (331); Ellis (389).
Technical effect of. Ellis.
Agent may use on parol authority. Worrall (390).
Is surplusage when. Worrall; Gibson.
SEALED INSTRUMENTS: Are deeds. Rann (312).
SEARCH: *See* SEARCH WARRANT.
SEARCH WARRANTS: Must be certain; technical requirements. White (130).
SEATTLE (36): Denial; admissions in pleadings.
SEDUCTION: Hood (141).
SELF DEFENSE: Necessity produced by slayer, how viewed. Vaiden (155). *See* NULLUS COMMODUM; VOLENTI.
Right to resist illegal arrest. Howard (166); Allen (167).
SEMAYNE'S CASE: Right to break and enter doors. *See* ARREST.
SEMPER PRÆSUMITUR PRO NEGANTE*: *See* ACTORE; PRESCRIPTIVE C. § 185.
SENTENCE: Must rest on a sufficient record. C. v. Roby (74).
SEPARATION OF WITNESS: *See* DISCRETION.
SERMO INDEX ANIMI: Speech is an index of the mind.
SERVICE OF PROCESS: *See* PROCESS; Return or appearance necessary for judgment. Pennoyer (58); Galpin (63).
By publication. Ricketson (59); Galpin.
By means of fraud insufficient. Dunlap (108); Hauswirth (51); Ilsley (169).
Exemption from. Dunlap.
Protection of officers what will. Savacool (164); Allen (167); Ilsley (169); Blair (170).
Infants can not waive as an adult. Windsor (1); Galpin (63).
SET OFF: Mutuality as an element. Richardson (230).
SHAM PLEADINGS: *See* FABULA.
Observations on. P. v. McCumber (110); Robinson (45); S. v. Baughman (368).
Will not confer jurisdiction. Wonderly (102), *et seq.*
SHELLEY'S CASE (417): Construction of deeds.
Kent's apostrophe to. Dovaston (217).
SHERIFF: *See* ARREST; SERVICE OF PROCESS.
SHERMAN (305): Contracts must be certain. *See* SALE.
SHINDLER (407): Sale; acceptance.
SHOP BOOKS: When admissible in evidence. Price (213*f*). *See* BOOKS.
SHUEY (323): Contract; revocation of offer.
SHUTTE (291): Procedure; important rules.
SIC UTERE TUO UT ALIENUM NON LÆdas: So use your own, as not to injure another's property. § 210.
SIGNATURE: What is a sufficient; general observations. Brown (346).
Memorandum required by the statute of frauds. Wain (335).
Estoppel to deny; accepting and acting on a contract is a sufficient signing. Brown (346).
SIMPLEX COMMENDATIO NON OBLIgat*: L. C. 374-384. §§ 374, 380.
SIX CARPENTER'S CASE (165): Trespassers *ab initio*.
SKEATE (82): Duress; sufficient pleading.
SLANDER: *See* SCANDAL; DEFAMATION; ARGUMENT.
SLOMAN (393): *See* STIPULATED DAMAGES; PENALTIES.
SMITH v. HODSON (156): Election of remedies.
SMITH v. MARRABLE (382): Warranty of leased premises.
SMITH v. WILSON (401): Custom and usage.
SMOUT v. ILBERRY (417): Death revokes agency. *See* Boston (320).
SOUTIER (402): *See* CUSTOM; USAGE.
SOVEREIGNTY: Cannot be sued against its consent. Hunsaker (259); Belknap.
SPECIFIC PERFORMANCE: Pusey (276).
SPLITTING CAUSE OF ACTION: *See* RES ADJUDICATA. Forbidden. Perez (2*c*).
SPOLIATOR: Armory (180). *See* EVERY.
SPRAIGUE v. THOMPSON (236): Statutes valid in part.
SPRING CO. (366): Lobbying; illegal contracts.
SPRINGER (24): No administration of a living man's estate.
SQUIB CASE: Scott v. Shepherd (417); Lickbarrow (394). *See* IN JURE; PROXIMATE CAUSE. §§ 417, 19.
STABILITY OF LAW: *See* STARE DECISIS; LEX EST MISERA; UBI JUS INCERTUM IBI JUS NULLUM. *See* PREFACE (DATUM POSTS).
STAPILTON: Compromise.
STARBUCK (263): *Coram judice* proceedings; essentials.
STARE DECISIS, ET NON QUIETA MOvere: To adhere to precedents and not to unsettle things which are established.
But precedents must conform to fundamental law. Huntsman (231). *See* PRESCRIPTIVE C.; STABILITY OF LAW; PREFACE (DATUM POSTS). § 219*a*.
STATE: *See* SOVEREIGNTY; GOVERNMENT.
Not bound by constitution unless named to be bound. Barron (241).
[C.—stands for Commonwealth; P.—for People; R.—for Rex (King) or Regina (Queen); S.—for State; U. S.—for United States.]
S. v. BAUGHMAN (268): *Fabula non judicium*. Springer (24). *See* CAUSE OF ACTION.
S. v. BEACH (258): Limitations of power of legislature to change the burden of proof. *See* ACTORE; PRESCRIPTIVE C.
S. v. BOLDEN (216): Implications annex themselves by construction. *See* PRESCRIPTIVE C.
S. v. CONKLING (109): Dead issues give no jurisdiction.
S. v. CONWELL (174): *Dies non*.
S. v. CROTEAU (271): Province of court and jury.
S. v. MARLER (188): Insanity; burden of proof.
S. v. THOMAS (257): Statute—code—can not make conclusive rules of evidence. *See* PRESCRIPTIVE C.
S. v. THURSTIN (23): Indictments must be certain.
S. v. TOWNLEY (225*a*): S. P. C. v. Hess; S. v. Bolden.
STATUTE OF FRAUDS. *See* FRAUDS AND P.
STATUTES: Legislative acts how proved. C. v. Kane (183).
Construction of rules illustrations. Trist (214-260).
Fundamental law is annexed by implication. *See* PRESCRIPTIVE CONSTITUTION. Trist (214); C. v. Hess (215); S. v. Bolden (216); Dovaston (217); Burks (217*a*); Harper (218); Murray's (219); Taylor (219*a*).
Contracts incorporate by implication. Von Hoffman (239).

Mandatory; directory; distinction. Ricketson (59).
Penal and criminal are strictly construed. Burks (217*a*).
• Conferring civil rights are strictly construed. Burks (217*a*).
Yield to the requirements of conserving principles of procedure. *See* CONSERVING PRINCIPLES. Indianapolis (223), *et seq.*; O'Connell (224); Bates (225). *See* LEX NON EXACTE.
Intention governs construction of. Indianapolis.
Necessity, convenience, reason, morals, and public policy influence and dominate the construction of. Trist (214), *et seq.* *See* VERBA INTENTIONE.
Borrowed from another state is construed the same. S. v. Moore (222*a*).
When void for uncertainty. James (233); Spraigue (236).
Title of. Bobel (250).
Fraud is excluded in construction of. Lester (341); Trist (214).
STATUTORY RECORD: Observations. Windsor (1); Clem (2*c*); distinctions between mandatory record and. Planing (2*d*).
Trial judge must sign. Planing (2*d*).
Every presumption is against. Bates (225); Harris (158). *See* ACTORE; Richardson (230).
Statement of facts is a fundamental right. Wilson (154).
Will not supply mandatory records. Furman (147*a*).
Facts proved may be certified instead of evidence to avoid prolixity. Vaiden (155); R. R. (290*a*).
Constitution of functions outline citation. R. R. v. Stewart (290*a*), *et seq.*
Prolixity should be avoided. § 290*a*.
STATUTORY RIGHTS: How pleaded. Williams (7); Russell (87). *See* VERBA FORTIUS.
STETSON (163): Joint trespassers, torts by officers.
STILK (313): Consideration; important rule. S. P. Cumber.
STIPULATION: Of counsel must be in writing. Sturdivant (410).
Can not dispense with the mandatory requirements of a constitutionalism. Campbell v. Greer (2*a*); People's Bank.
STOKES (207): *Res ipsa loquitur.*
STOPPAGE IN TRANSITU: Observations outline citations. Lickbarrow (394).
STRONG (213*a*): System; admissibility of to prove intent.
STUBBINGS (49): *Placitum* essential.
STURDIVANT (410): Agency; words *descriptio personæ.*
STURGES (111): Prolixity must be avoided.
SUA SPONTE: Windsor (1). Campbell (2).
SUBJECT MATTER: Jurisdiction of essential. Windsor (1); Sanborn (61).
And it must be retained. Windsor. *See* JURISDICTION.
Construction proceeds from the nature of. Sturdivant (410), *et seq.*
SUBPOENA: *See* PRODUCTION.
Duces tecum, *sub* C. v. Kane; 15 Fed. Rep. 716.
SUBROGATION: Volunteer paying debt of another is not subrogated. Boston (320); doctrines; contribution. Dering.
SUMMA RATIO EST QUÆ PRO RELIGIONE facit*: Morality a ground and rudiment of law. § 214.
SUMMONS: Must be served on infant. Galpin (63).
Adult may waive by appearing. Pennoyer (58). *See* APPEARANCE.
Abuse of authority revokes. Windsor.
SUNDAY: Process cannot be served upon. Hauswirth (51); S. v. Conwell (174).
Not a day for judicial work. *See* DIES NON; S. v. Conwell (174); Langabier.
Contract made on; defense too remote. Hall (369).
SURETIES: *See* Rees (334*a*).
Fraud and deception releases. Harris.
SURPLUSAGE: Not required in proof. C. v. Kane (183).
Seal to a contract is; when. Gibson.
Vitiates; when. Kraner (299).
Words *descriptio personæ* are. Sturdivant.
SURPLUSAGIUM NON NOCET*: *Utile per inutile non vitiatur.* §§ 155, 253.
SWIFT v. TYSON (417): *See* COMMERCIAL PAPER; BONA FIDE PURCHASER.
SYSTEM: Admissible to prove intent. Strong v. S. (213*a*).
TAINTOR (344): Agency; undisclosed principals; rules as to deeds.
TARBLE'S CASE (247): Polity of federal government; justification defenses.
TARLING (404): Sales; when title passes.
TATLOCK: Novation. Birkmyr (339).
TAX: Depends on a record. L. C. 124-134; C. v. Kane (183).
TAXATION: L. C. 124-134. Fundamental principles of. L. C. 124-134.
States cannot tax agencies of federal government nor *vice versa.* McCullough (147); Collector (148).
Collectors; their liability. Stetson (163).
Retrospective—assessments—forbidden. P. v. Seymour (236).
TAX DEEDS: Can not be made conclusive evidence. S. v. Thomas. *See* PRESCRIPTIVE C.
TAXPAYER'S REMEDIES: *See* TAXATION.
TAYLOE (329): Contracts by letter.
TAYLOR v. CALDWELL (310): *Actus Dei*; excuse breach of contract.
TAYLOR v. PORTER (219*a*): Due process of law.
TECHNICALITIES: Are the safeguards of the law. Windsor (1); Six C. C. (165), *et seq.*; R. v. Wheatley (19), *et seq.*; Bissell (42), *et seq.*; Stubbings (49); Munday (79); Marbury (142), *et seq.*; Bristow (135); Eddy (136).
Estoppels depend on. Bailey (44).
Taxation cases illustrate, L. C. 124-134.
Apply in taxation. Lawrence (132), *et seq.*; P. v. Hastings (144).
Contract technical allegations protection depends upon. Lampleigh (301), *et seq.*
Foundation of contract involves technical essentials. Lampleigh (301), *et seq.*; Sherman (305), *et seq.*
Title; when it passes. Tarling (404).
Equitable exceptions to statute of frauds. Rules of technical. Lester (341).
Commercial paper depends on illustrations. Sturdivant (410-412).
TEMPEST (408): Acceptance of chattel; when title passes.
TERMS OF COURT: Rules relating to. Roy (288). *See* JURISDICTION.
Courts must act at time and place specified. Blair (170).
Judges in vacation, powers. Blair.
TERRY (240): Statute of limitations; when they accrue are a vested right.
TESTIMONY OF DEAD, ABSENT AND disqualified witnesses. Drayton (213*e*).
THATCHER (117): Sale of land under statutory powers; important rule.
THEORY OF THE CASE: Observations relating to. Windsor. *See* WAIVER; MAN-

DATORY RECORD; PREFACE (DATUM POSTS). L. C. 290b-299.
THOMAS v. BOARD (10a): Allegations must be certain. VERBA FORTIUS.
THOMAS v. MACKEY (15): *Allegata et probata* must correspond.
THOMAS v. WINCHESTER (417): *See* Langridge.
THOMSON v. DAVENPORT (342): Agency; disclosed and undisclosed principals.
THORNBOROW (333): Unconscionable agreements; adequacy of consideration not inquired after.
THREATS: *See* DURESS; COERCION.
TICKETS: Contracts arising from passenger. Coggs (350), *et seq.*
Limiting liability of. Railway v. Lockwood (352); Hollister (354); Kansas City R. R. (357).
Protection due to passenger. Kansas City R. R. (357); Craker (417).
Outline citation general observations. Kansas City R. R. (357).
Assignability of. Kansas City R. R. (357).
Time tables; a part of carrier's contract. Le Blanche (417).
Assent to conditions in, not presumed. Pa. R. R. (417); Cherry (417).
TILTON (133): Taxation proceedings must be certain.
TIME: Computation of. Warren (243).
TITLE: To statutes; effect in construction. Bobel (250); S. v. Bolden (216).
To property; judgment in tort will not transfer. Lovejoy (289); Miller.
Thief can give no title. Bentley (417). *Nemo dat que non habet.* *See* PRESCRIPTIVE CONSTITUTION.
TOBEY v. BARBER: Payment; law of (417).
TOO BROAD; TOO NARROW: Pleadings must not be. Bowlus (100). *See* PLEADINGS.
TOOL CO. (365): Lobbying contracts illegal.
TORTS: *See* MALICIOUS ACTS; NEGLIGENCE; Squib Case.
Enticing one to break a contract. Lumley (417).
TRACY v. TALMAGE: *In pari.* Holman.
TRESPASS: Officers when liable for. Lange (159); Stetson (163); Savacool (164); Howard (165).
Trespasser can claim no benefits from his trespass. Bull (417).
TRESPASSER AB INITIO: Who are. Six C. C. (165).
TREVIVAN (78): The last estoppel prevails.
TRIST v. CHILD (214): Construction; moral laws are fundamental and a part of the prescriptive constitution.
TRUE: Pleadings must be. Wonderly (102). *See* FABULA. Pain (107).
TRUEMAN: The bar of bankruptcy is waived by a new promise; also of limitations. Bartholomew (302).
TRUST AND TRUSTEES: Cannot deal with trust estate. Keech (417); Boyd (62).
Trustee cannot plead illegality as a defence. *See* AGENCY.
TWYNE'S CASE: Fraudulent conveyances.
UBI EADEM RATIO, IBI IDEM JUS, etc.: Where there is the same reason, there is the same law, and the same judgment should be rendered on the same state of facts. §§ 34, 127, 222a.
UBI JUS, IBI REMEDIUM*: Observations. Marbury (142); Ashby (273); R. R. v. Greer. §§ 142, 183, 273, 274, 278, 279, 283, 286, 341.
UBI JUS INCERTUM, IBI JUS NULLUM: Where the law is uncertain there is no law. *Nihil in lege.* *See* PREFACE (DATUM POSTS); STABILITY OF LAW. P. 1, § 185.
ULTRA VIRES: Contracts are, when. Hill (417); Hitchcock (417); Salt Lake. §§ 177, 302, 417.
UNCERTAINTY: Is destructive of jurisprudence. *See* PREFACE (DATUM POSTS); UBI JUS INCERTUM; STABILITY OF LAW.
UNDUE INFLUENCE: Avoids a contract. Holman (363); Chesterfield (417); Horn (417); Huguenin (417). *See* DURESS.
U. S. v. CRUIKSHANK (232): The study of procedure is a study of government; indictments must be certain. *See* Vadakin.
U. S. v. GOODING (202): Accomplices; confessions of; indictments upon statutes.
U. S. v. KING (192): Possession of the means of crime; presumptions from.
U. S. v. MILLS (235): Indictments must be certain.
U. S. v. PEREZ (69): Former jeopardy; elements of.
UNIUS OMNINO TESTIS RESPONSIO NON audiatur: Let not the evidence of one witness be heard at all.
UNO ABSURDO DATO, INFINITA SEquuntur: One absurdity being allowed an infinity follow. § 225.
UNWRITTEN CONSTITUTION: *See* PRESCRIPTIVE.
USAGE: *See* CUSTOM.
USURPATION: Exercise of, divests jurisdiction. Windsor (1); Weaver (67); Piper (114). *See* OBSERVATIONS. Lange (159). *See* PREFACE. Cohens (244).
Official usurpation and actionable tort. Savacool (164). *See* C. C. (165).
UTILE PER INUTILE NON VITIATUR**: *See* SURPLUSAGE. §§ 34, 155, 253, 264, 290a, 373.
UT RES MAGIS VALEAT QUAM PEREAT: That the thing may rather have effect than be destroyed. Malian (373); Vogt (324a). *See* BENEDICTA; CONCORDARE. §§ 52, 217, 218, 232, 236, 266, 321, 334, 373, 393, 410, 412.
VADAKIN (11); Aider of pleadings; jurisdictional facts not supplied by indictment (U. S. v. Cruikshank).
VAIDEN (155): Statutory record should not be prolix (R. R. v. Stewart, 290a).
VAIN AND FRUITLESS THINGS ARE never required: *Lex neminem cogit ad vana.*
VAN CLEAF (17): *Res adjudicata* depends on a certain record.
VAN LEUVEN (14): Aider of pleading by appealing; limitations.
VAN SLYKE (177): The judicial function cannot be delegated.
VARIANCE: *See* DEPARTURE.
Shall not be a. Windsor (1). *See* FRUSTRA. Bristow (135).
VENDOR AND VENDEE: *See* SALES.
VENUE: Local and transitory actions. Mostyn (274).
VERBA (CHARTARUM) FORTIUS ACcipiuntur contra proferentem**: The greatest beacon light of the law. P. 11. *See* PREFACE; FRUSTRA; DE NON APPARENTIBUS. Dovaston (217).
Pp. 3, 6, 11; §§ 1, 2c, 2f, 5, 7, 9, 10a, 11, 12a, 17, 21, 27, 30, 34, 46, 71, 79, 82, 84, 86, 91, 107, 108, 118, 158, 186, 217, 217a, 225, 232, 299, 301, 334, 410.

VERBA GENERALIA RESTRINGUNTUR ad habilitatem rei vel aptitudinem personæ**: Rossiter (417); Bristow (135). §§ 33, 34, 135, 217*a*, 244, 255, 264, 290*a*, 374, 417.
VERBA INTENTIONE DEBENT INSERvire*: P. 5; §§ 5, 108, 214, 216, 217*a*, 218, 225, 308, 391, 393, 400, 410.
VERBA NIHIL OPERARI MELIUS EST quam absurde: It is better that words should have no operation than to operate absurdly. Huntsman (231). §§ 218, 224, 225.
VERBA OFFENDI POSSUNT, IMO AB EIS recedere licet, ut verba ad sanum intellectum reducantur: Reason controls meaning of words; absurdities must be excluded. Huntsman (231). § 218.
VERBA RELATA HOC MAXIME OPERANtur per referentiam eis inesse videntur*: §§ 59, 70, 71, 101, 264, 290*a*, 295.
VERDICT: Will not supply omitted allegations. Hitchcock (12).
VESTED RIGHTS: Cannot be impaired by legislatures. Calder (237); Dash (237*a*); Bronson (238), *et seq.*
VIEW OF PREMISES: *See* RES IPSA LOQUITUR; PRÆSENTIA CORPORIS.
VIGILANTIBUS ET NON DORMIENTIBUS jura subveniunt: The laws serve the vigilant, not those who sleep. § 298.
VIPERINA EST EXPOSITIO QUÆ CORrodit viscera textus: That is a viperous exposition which gnaws out the bowels of the text. *See* BENEDICTA.
VIRGINIA COUPON CASES (285*a*): Unconstitutional law is no law.
VOGT (324*a*): Parties must make their own contracts; these will be construed as made.
VOID AND VOIDABLE: *See* STATUTE OF FRAUDS; ILLEGALITY; MISTAKE; RESTRAINT OF TRADE.
Concealment of facts avoids a contract when. Diggle (371).
VOID IN PART, VOID IN TOTO: A statute may be valid in part. Spraigue (236).
Also a contract. Mallan (373); Mitchel (372); Pigot (417).
VOID THINGS CANNOT BE WAIVED OR aided: Windsor (1), *et seq;* Shutte.
VOLENTI NON FIT INJURIA*: *See* CONSENSUS.
One must minimize damages. Smeed (417).
One inviting his own injury can impose no obligation on one injuring him. U. P. R. R. v. Cappier (417).
Negligent execution of contract is no defence. Williams (417).
§§ 30, 34, 71, 141, 155, 198, 207, 282, 295, 354, 357.
VOLUNTEERS: Party paying debt of another is not subrogated. Boston (320).
VON HOFFMAN (239): Retroactive laws. Bronson (338).
VOORHEES (119): Inferior tribunals; presumptions.
WABASH (137): *Allegata et probata* must correspond.
WACO (300): Certificate of doubt; practice.
WAGER: Contracts of, validity; outline citations. Good (58); Ditchburn (259); Evans (360); Da Costa (361); Bunn (262). *See* IN PARI DELICTO; ILLEGALITY.
WAGNER v. GIBBS (290): Record in criminal case, when admissible in a civil case.
WAIN v. WARLTERS (335): Memorandum required by the statute of frauds.
WAIVER: *See* ASSIGNMENT OF ERRORS.
Error shown from the mandatory record cannot be waived. Windsor (1): cases, *et seq.;* Clem (2*c*); Garland (60).
Matter of the mandatory record cannot be waived. Windsor (1), *et seq.;* Roden (12*b*), *et seq.*
Answers cannot be waived. Garland (60); Boyd (62); J'Anson (91).
Of pleadings, observations. Campbell (2); R. v. Wheatley (19), *et seq.;* Munday (79), *et seq.*
Cannot be under codes. Borkenhagen (81); Kraner (299). *See* DEFENCES.
Allegata et probata must correspond, is mandatory under codes. Borkenhagen.
Abatement matters may be waived. Harkness (152).
By failing to assign error. *See* ASSIGNMENT OF ERROR.
Or to argue. Gibler (96); Kraner (299). *See* CONSENSUS.
Usurping jurisdiction not a matter of waiver. Windsor (1).
After removal of cause to federal court, participating in trial is no waiver. Harkness (152).
Abuse of power as to waivable matter gives right to review. Clyde Mattox.
WALDEN v. BODLEY (139): Amendments; limitations of the right.
WALKER (118): Inferior tribunals; important rules.
WARRANT: Void, no protection to officer. Savacool (164); Howard (166).
WARRANTY: *See* CAVEAT EMPTOR; SIMPLEX COMMENDATIO; MISREPRESENTATION. R. v. Wheatley (19).
Outline citation; illustrations. Chandelor (374); Pasley (375-384), *et seq.*
Deceit, effect of. Chandelor; Pasley.
Implied. Jones (376); Hogins (379).
Oral evidence cannot add implied. Hogins; Vogt (324*a*).
Of real estate; observations; illustrations. Harris (380-383).
Of furnished apartments; distinctive rule. Smith (383).
WARREN (243): Computation of time.
WATKINS (269): One cannot prosecute himself.
WAY: Of necessity, rule of. Logan (249); Pinnington (417).
WEAVER (67): Abuse of power divests jurisdiction.
WEBB: Statutes cannot be evaded. Ilsley.
WELBORN (388): Delivery and acceptance of deeds.
WELTMER (268*a*): *See* FABULA NON JUDICUM.
WHAT OUGHT TO BE OF RECORD MUST be proved by record and by the right record*: *See* EXPRESSIO UNIUS; Windsor (1); Campbell (2); Clem (2*c*), *et seq.;* Planing Mill (2*d*); Iverslie (46), *et seq.;* L. C. 113-134; C. v. Kane (183).
Taxation requires this rule. Rustin (134).
WHEADON (349): Mistake; reformation of.
WHERE ONE OF TWO EQUALLY INNOcent persons must suffer from the fraud of a third, he who first trusted must first suffer*: Lickbarrow (294); Swift (417); Young (417). *See* BONA FIDE PURCHASER.
Possession is notice of occupant's right. Williamson (417); Le Neve (396). *See* COMMERCIAL PAPER.
Negligent execution of contract. Williams (417); Lickbarrow (294).
WHITE v. BLUETT (317): A consideration must be real.

WHITE v. CORLIES (303): Contract, when complete. *See* SALES.
WHITE v. FORT (175): Merger of remedies.
WHITE v. LYONS (140): Prayer to pleadings; sufficiency.
WHITE v. WAGAR (130): Search warrants; requisites.
WHITNEY (112): Code prescribes direct and single statements.
WIEBOLD (98): Names; *Idem sonans.*
WIGGLESWORTH (399): Custom; oral evidence.
WILKERSON (221): Cruel and unusual punishments.
WILLIAMS v. BANKHEAD (93): Parties to actions.
WILLIAMS v. CARWARDINE (322): Rewards; law of.
WILLIAMS v. EGGLESTON (94): Only a wronged person can appear.
WILLIAMS v. HINGHAM (7): S. P. Rushton (5).
WILLIAMS v. PEYTON (116): Sale of land depends upon strict compliance with law.
WILLIAMSON v. BERRY (65): Judicial sales must be confirmed.
WILSON v. BRETT (351): Bailments.
WILSON v. U. S. (154): Duty of judge to give statutory record.
WINDSOR (1): *Audi alteram partem.*
WINONA, ETC., LAND CO. v. S.: A review of any matter from a state court in the federal supreme court depends on exceptions and technical procedure. *See* Windsor (1).
WITNESS: Cannot be compelled to criminate himself. Counselman (178). *See* NEMO TENETUR.
Exempt from arrest. Dunlap (168).
Testimony of dead, absent and disqualified. Drayton (213*e*), *et seq.*
WONDERLY (102): False pleadings cannot confer jurisdiction.
WOOLLAM (53): ORAL EVIDENCE.
WORDS: *See* VERBA.
How construed; each word must be given effect. Spraigue (236); Vogt (324*a*).
WORK (242): The word "jury" in a consituation is given a common law definition.
WORRALL (390): Escrow deeds must be in favor of a third person; rules of deeds.
WRIGHT v. GRIFFEY (28): All estoppels must be pleaded; *res adjudicata* requirements.
WRIGHT v. TATHAM (201): The right to cross-examine is a fundamental right. *See* PRESCRIPTIVE CONSTITUTION.
YOUNG (417): Commercial paper; negligent execution.
ZALESKI (306): Contracts must be certain.
ZOUCH: Infant may disaffirm his deed; his deed is void. Trueblood (417); Craig (417). *See* INFANTS.

THE DATUM POSTS OF JURISPRUDENCE

By WILLIAM T. HUGHES
Author of "CONTRACTS" and of "PROCEDURE"

"Man's greatest interest on earth is justice, sir," involves jurisprudence, which has for allies, philosophy, theology and history. These are the uplifting factors of humanity; these factors pervade the life force of every good government, prescribing and regulating its conduct for the good of the whole. It is jurisprudence that molds and directs great moral agencies for progress, education and protection. The basic principles of that force should be as familiar to jurisprudents as is the decalogue to the theologian. Whether they are or not may be tested by asking lawyers and comparing their answers. From these answers it may be determined whether or not there is a distinctive niche for a small work that will present these principles so they can be turned to on every hurried and pressing occasion for awakening thought, attending suggestion and for safeguarding and lighting the way. It will be more than a key; it will be a guide.

This work is offered as the greatest condensation of basic principles; to name, to make them most tangible as a needed exposition of the chief causes that have unsettled the law in various states; also of the adoption of views therein inimical to fixed and protecting government. In this connection several states are expressly mentioned. Also why it is that cases like *Pennoyer*, *Windsor* and *Haddock*, reaffirming the fundamental maxims of antiquity, make so much commotion if not astonishment among the American Bar.

It is explained that jurisprudence has its DATUM POSTS and that from and around these the law has been developed. These dominant initials are gathered and impressed with copious yet concise illustrations. The Mount Everests of jurisprudence are pointed to and impressed as first precepts, constituting grounds and rudiments of law. In other words the law is shown to have its "beacon lights" and "landmark cases," as well as history and other presentments. From these the "profuse jargon of useless grists" can be readily discerned, also the departures from fundamentals by prominent errorists and misguided courts.

For the ends in view the content matter of DATUM POSTS is gathered from on high and is aligned on down. It is written from Alpine mountains, not from molehills; from fountains, not from rivulets. The principles of the unwritten constitution from the Roman, Norman, English and Federal are in one unbroken line. These principles are the maxims and their illustrative cases; e. g., *Audi alteram partem* is illustrated in *Windsor* v. *McVeigh* (U. S.); it is a part of DUE PROCESS OF LAW from the Roman, the Norman and the English (from Magna Charta) reexpressed in *Murray* v. *Hoboken Co.* (U. S.). These matters and their parts are variously expressed in the many provinces and on adown the numberless rivulets; they are set and made conspicuous in DATUM POSTS as DATUM POSTS in order to impress them. From these as set and explicated are seen the prolific discussions arising and issuing therefrom and in some quarters the hazy claims that "due process of law" can not be defined; also that each state may establish a local species of "due process of law" for itself, excluding fundamental principles of the unwritten constitution indispensable in a constitutionalism. It is not conceded that there is new or distinctively American law.

Those who believe that the simplicity, the morality, the intensive usefulness and the history of the law is yet to be written will be much interested from a review of the acorns, roots and heart-wood. Therefrom will appear the grounds and rudiments of law, its reason, necessity, convenience, public policy, and the mandatory requirements of defined government.

The following quotation may meet the acceptance of those who believe that

> "Our birth is but a sleep and a forgetting;
> The soul that riseth in us, our life's star,
> Hath elsewhere had its setting,
> And cometh from afar."

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The contents of the progressive, philosophical and bibliographical works such as Broom's Maxims, Smith's and White and Tudor's Leading Cases, Story's Pleading, Greenleaf's Evidence, Bishop's Criminal Law and Mechem's Agency are most easily found from this work, which is bone of their bone and flesh of their flesh, a fact which is made to appear; it does not conceal its parentage; nor does it pad therefrom. The great works are faithfully cited. This work epitomizes and condenses beyond all others. The matter of the great works was not alone in view, but the heart and vitals of the six leading subjects of the law were also wrung and picked out and are reflected as from a miniature composite as is next observed.

It reflects more than 100 rules from each of these subjects; namely, Procedure, Equity, Contract, Crime, Tort and Construction, which have all given up their leading rules for the soul of the newcomer. It is the ablest epitome of procedure, contract and construction, of maxims and leading cases.

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The conserving principles of procedure are enumerated and defined consistently with that law which was given by antiquity to posterity, and which is the greatest asset of every protecting government. These principles are expressly named and are constituted a nucleus from and around which hundreds of rules of evidence, pleading and practice are arranged, and from which all branches are correlated. The chief rule of evidence, namely, "What ought to be of record must be proved by record and by the right record," is constantly impressed. The mandatory record is defined and explained. This is presented as a constitutional implication.

Contract is well introduced in cases numbered 301-417. Under each case are gathered the various authors on contract who have cited the leading cases (thus results a key to the library). Sixty pages do for contract what no other work thereon has done. It is a valuable complement to every work on contract. The elements of crime are likewise condensed. It surpasses any work on construction. The principles of the unwritten constitution are shown to be the "metwand" of the meaning of words in American organic law. Along this line of thought much that relates to constitutional law in introduced. Its principles are interwoven.

To its pages it is the best maxim and leading case work. These are selected to illustrate the unwritten constitution. With these ends secured it was next in order to gather and arrange the matter of the great works, also the dry anatomy of the leading subjects of the law.

This work is a nonpareil in more respects than in type alone. For it is a nonesuch for the beginner, a peerless for the student, a matchless for the practitioner, a boon for the professor and an incomparable for the jurist. It is like a well from which all can draw according to his reach. The novice will see more of the fundamental principles and the leading and annotated cases than mere prefatory claims relating thereto. Every time he opens this work he will see those desiderata marked by designating type and in conspicuous alignment and therein followed by their bibliography. There is nothing left for him to dwell upon, or study over, or inquire after in order to know what are the fundamentals, and the leading cases illustrating them. The index alone will teach him. It will point to the maxim and the case upon the subject he is considering directly with ease, certainty and facility. Grouped around the DATUM POST so pointed out, will be found the bibliography of the question (thus will appear the key and the guide).

As the improved firearm advanced the soldier, so the improved law book will advance the lawyer.

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I. W. Foltz in The Chicago Legal News and The Chicago Law Journal writes as follows:

THE STUDENT MENACED.

The laws of a country form the most important and instructive part of its history. It is by means of a nation's laws that justice and domestic tranquillity are established and forever insured, thereby promoting the general welfare of the public and securing to its citizens all the blessings that can flow from civil and political, religious and intellectual liberty. And at the same time, it is by means of a nation's laws that injustice, tyranny and absolutism are established with all the resulting evils of greed, vice, poverty, ignorance and final barbarism. The former class of laws is dictated by nature, reason and morals. The latter is the result of folly, pride and selfishness. A people who enjoy laws that are concise and animated and so classified and correlated that they can be easily found and learned, are surely destined to excel, in power and virtue, all others whose laws are complex and voluminous, uncertain and conflicting. A system of laws, in order to be effective, salutary and enduring, must be based on fundamental principles from which must grow all the numerous legal rules that apply to the many particular cases that may arise in any and all the different departments of the law. Necessarily, many of these legal rules are of short duration; they would develop, serve their purpose and then give place to new and more suitable ones from the same source; but the underlying principles would endure unchanged forever. With the advance of time with all its attending growth of trade and commerce, science and arts and increase of national and social intercourse, comes a corresponding increase and change in the sources of litigation. All these evolutions, in time, require a change in the rules of the law, but not in the body of the law. Such temporary rules of the law may be often found in statute, practice acts and rules of evidence, but the body of the law should consist in the great underlying principles of the law, such as *Salus populi suprema lex, Verba fortius accipiunter contra proferentem* and others, without which principles no legal system can long endure.

The ideas above expressed are not of English or Anglo-Saxon origin; they are Roman and Norman. Notwithstanding race pride and the endless and forceful arguments of many able English lawyers to the effect that the body of the common law of England is entirely of English origin, the world is fast coming to the conclusion that the majority of the basic principles in the legal systems of every civilized nation on earth was directly or indirectly derived from the Roman law. The science of law is a Roman creation. The Roman was happily endowed with the inclination and power to reason on matters relative to public and social affairs. In his victorious and triumphant marches to and fro, he collected, learned and condensed the good sense of the ages, all of which he utilized in perfecting his laws. Among the many treasures bequeathed to the world by the Roman people, the one that has worked most for order, peace and happiness is Roman jurisprudence. Indeed, if the English common law were to discard all it received from the Roman law, it would have nothing left but its ancient barbarous usages and customs. The Roman law was constructed on simple fundamental principles, the truth and value of which principles every one who is led by the light of reason must accept without question, while the common law consists of a heterogeneous mixture of barbaric usages, Roman relics, Aristotelian philosophy, theological casuistry, and military and feudal regulations.

When Roman jurisprudence was in its highest perfection, the Roman devotees of the law committed to memory and constantly contemplated the fundamental principles underlying their law. They always agreed on the truth and value of these principles. Disputes in cases were confined to the question as to which particular rule of law should control in the case at issue and out of which fundamental principle the rule should grow. In other words, the Roman jurisprudence had fundamental principles to rest upon, by means of which it could develop on logical and philosophical lines. All cases were referred back to first principles. Of course, judicial decisions in similar cases were considered and treated with respect, but not adopted and followed as precedents.

But how different is the jurisprudence of the English speaking races who have largely adopted and followed the plan of the English common law. In the latter the law has no other basis than the ever-changing quicksand of precedents upon which it rests. In our country the great bulk of our law consists of constitutions, statutes and indefinite rules and precepts laid down in an infinite number of cases, many of which are more or less poorly reasoned. When we view our law as an entirety, it is a tangled mass of wisdom, folly and inconsistencies, without any semblance of a *corpus juris* (except as to the constitutions and statutes which comprise but a very small portion of the whole bulk). As it is, principles and rules are only assumed tentatively and applied to particular cases. No definite and exact rule of law can be said to exist until after it has been formulated and pronounced in a case at bar. The rule adopted in the case at bar may be more or less like some rule applied by another judge in another case, but it is not exactly the same rule. And thus a rule of law is often taken and expanded and distorted until it becomes so perverted and dangerous that its pernicious course is finally changed either by an overruling judicial rule or by legislative enactment. The reported cases are now becoming so numerous, varied and conflicting that a reason therein can be found for almost any doctrine, however novel, and thus the law is rendered as unstable as a quagmire. There are few things more uncertain than the result of a lawsuit. It is only from the observed intellectual phenomena of a court disclosed by its former decisions that a lawyer is able to guess what will be the future holding of that court. In most instances where a judge has made no rule in his own court that apparently fits the case at bar, he examines a number of the most recent reported cases for which he has the most respect, and observing their general trend, he lights upon a rule which he believes is justified by their sanction and this rule he proceeds to apply to the particular case at bar. In many of the decisions of the numerous courts of appellate jurisdiction the rules therein laid down are so loose and uncertain in form and meaning and contain so much *dictum* that they can serve but little purpose other than to render the law still more complex and confusing.

The foregoing statements are direct and pointed and their truth is apparent to everyone who has taken the care and time to investigate the question. But there is still much

more to be said on the subject. What can be truthfully told about the defects of our legal literature? Do our legal text books as a rule contain the true history and correct philosophy of our law? Do they disclose the real source of our law? These questions touch the field wherein grow many errors that menace the student of the law and destroy the harmony and usefulness of our jurisprudence. Many thousand text books have been written on our law. Many of them deal with particular minor subjects, others treat the law of an entire department of the law, and some attempt to present the law in all its branches and departments. Few of these works treat the law as an entirety, but on the contrary they teach it in fragments without showing any relation between the different departments or branches thereof. In other words, the law is not resolved into its general principles; and few attempts are made to show that the woof and warp of the law consist in the fundamental principles. As a rule there is but little evidence of a disposition to appreciate the proper province and duty of a court and the value and necessity of a harmonious and protecting jurisprudence. There seems to be a prevailing opinion that the prime duty of a court extends no further than dealing out substantial justice to the parties litigant in the case at bar, and that the court has little concern in the maintenance of a uniform and cohesive jurisprudence.

The authors of legal text books and encyclopedias usually present and discuss the law as they find it scattered here and there, far and wide in the reports of the decisions of the numerous courts. These decisions are often conflicting, irreconcilable and confusing, nevertheless they are cited and often given equal commendations by such authors and accordingly most of the legal text books are written. The reader will see in many of those text books passages to the effect that "the authorities conflict on this subject," and that "the weight of the authorities holds this to be the law," and that "this is the law on this question, but there are many good authorities that hold to the contrary," and that "the authorities are not clear on this subject." Indeed, many of the text books are sometimes so evasive and confusing that their reader is often less decided as to what the law is on the question under consideration than he was before he began to consult them. Ample proof of these assertions can be obtained by reading the most widely advertised great work of the age, Cyclopedia of Law and Procedure, especially under such topics as Accord and Satisfaction, Appeals and Errors, Assignment of Choses in Action, Criminal Law, Equity, Estoppels and Gifts, etc., etc.

We can discover from these text books that the courts in many states in recent years have so far departed from fundamentals that they are viciously undermining the entire fabric of the law by holding that pleadings can be waived. See Hughes on Procedure, pp. 7-32. We can note therein that numerous courts are disregarding *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged) and its kindred maxims, and yet the authors thereof do not complain that such departures will surely overwhelm even the most perfect jurisprudence. We can see instances where variances are countenanced and upheld and we can behold statements to the effect that legislatures can authorize such variance. Seldom therein do we see a proper description of the profound functions of pleadings, or reasons given why *"allegata et probata* must correspond," is an essential rule in a constitutionalism and that such rule is related to the rule that "a court is bound by its record"; nor are we told therein that all these elements are essential requirements in a government of limited and defined powers. Indeed some of the greatest authors and writers and many of the courts of last resort may be cited in denial of the maxims last stated. See Hughes on Procedure, pp. 29-32; 2 Thompson on Trials, secs. 2310-2311; Andrews Stephen's Pleadings, 230, 2d ed. Every phase of the last mentioned rule is equally commended in the Cyclopedia of Law and Procedure. See 2 Cyc. 691-692, and cases; 2 id. 715; 12 id. 372, 390; 16 id. 403-406. Scores of pages therein can be cited *pro* and *con* with equal commendation, and the collection of conflicting cases and rules are hopelessly confounding and bewildering. Seldom do we see a clear and distinct description of the respective functions of the mandatory or judgment-roll record and the statutory record (bill of exceptions); and rarely do we find a clear and distinct statement as to what constitutes formal error and as to what constitutes substantial error. These books rarely define what constitutes the foundation of a judgment nor do they demonstrate the importance of such foundation and the necessity that all courts should agree upon such foundation. The division of state power, although a very essential and salutary feature in our governmental institutions, is seldom referred to in the books.

In the last generation a supposed distinction between substantive and adjective law has arisen which distinction has been greatly emphasized. One edition of books was produced to present the substantive law and another edition to present the adjective law. However, these works did not seem to be sufficiently acceptable upon those theories, and to correct the mistake another edition followed on a different plan. These facts disclose a condition that bodes more ill than good and indicate that financial success of the publisher is of more importance than the intrinsic merit of the work.

Books are widely advertised as the student's guide and counselor and proclaimed as the *ne plus ultra* effort of a multitude of professors in leading colleges, and yet they never cite nor discuss one fundamental. Frequently the greater portion of such books consists of matter garbled from an ordinary law catalogue and the remainder is composed of a pad of inferior rules together with a series of attacks on works that are not developed on the same plan. The publishers of such books seem to pervade their whole output with an air of something new or modern or American, and the buyer is often deceived thereby.

Legal literature and methods of instruction are casting too much responsibility upon the student. As it is, he must choose for himself and if he decides unwisely he must suffer the consequence. In America the matter of a legal education is a free-for-all contest; and all schools, all sects and all teachers are saying all things. The conflicting theories have created a condition that is completely bewildering. There are all kinds of literature for all men and every ism. The result is an abracadabra. The student will surely revolt after he has been fully advised.

The reader may say: "Yes, the conditions are bad and the danger is great. But what shall be the remedy?" The answer to the question should be, "We must go back to and stand upon the fundamentals as the Romans did when the lights of their jurisprudence shone brightest." Even the most perfect codification of our laws would not save us unless

we adhere to the fundamental principles of the law and ever bear them in mind. Every devotee of the law should always remember that jurisprudence is intimately involved with government and that the study of law is the study of government. There is just as much truth in the maxim *Debile fundamentum fallit opus* (when the foundation fails, down goes the entire structure) as there were when Greece, Rome and other once wonderful nations went down to destruction to the everlasting shame and dishonor of those who were responsible for the proper administration of their laws. Our ancestors designed and established a splendid scheme of government and jurisprudence attended with a constitution replete with wise provisions for the protection of life, limb, liberty and property. The complete development and the perpetuation of that scheme is the great concern and duty of their descendants. The task to be performed by the descendants may call for the exercise of more wisdom and intellectual power than was required of their ancestors. Knowledge of fundamental principles accompanied by due respect therefor will provide us with a prescriptive or unwritten constitution which is of greater value and aid than the one that is written. These fundamentals are comparatively few and easily found. Bacon, the founder of the maxim theory in English law, displayed only twenty-five. Broom prominently treated but 104, all of which were taken directly or indirectly from the civil law. The civil law of Rome was based upon twelve tables, in the first of which was *Salus populi suprema lex.* The application of these principles can be seen in the decisions of Lord Mansfield, a lawyer of the ages. It was Mansfield who first extensively introduced into English jurisprudence the principles of the civil law of Rome. Agreeably to and under the influence of his decisions appeared in one single decade four great works, namely, Smith's Leading Cases, Story's Equity Pleadings, Greenleaf on Evidence, and Broom's Legal Maxims. In these works can be found the fundamental principles of the law; and the great and constantly increasing myriads of cases can be nothing more than an application of the rules growing out of such principles.

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Extracts from letters of Hon. Thomas M. Shackleford, Chief Justice of the Supreme Court of Florida:

Tallahassee, Fla., July 11, 1907.

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